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IN THE
United States
Court of Appeals
For the Ninth Circuit

RICHARD WATTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for
District of Arizona.

APPELLEE'S BRIEF

No. 16300

JACK D. H. HAYS

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For the District of Arizona*

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Court House Building
Tucson, Arizona

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IN THE
United States
Court of Appeals
For the Ninth Circuit

RICHARD WATTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for
District of Arizona.

APPELLEE'S BRIEF

INTRODUCTION

The Appellee, hereinafter referred to as the Government, will make the same designation as to the Reporter's Transcript and documents as made in Appellant's Brief.

JURISDICTION

The Government agrees with Appellant's statement concerning jurisdiction of the District Court and of this Court.

STATEMENT OF THE CASE

The Government agrees with Appellant's limited Statement of Facts. Additional facts pertinent to each Specification of Error will be set forth in more detail under the Argument for each Specification of Error.

ARGUMENT OF SPECIFICATION OF ERROR NO. 1

IT WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION AMOUNTING TO A VIOLATION OF APPELLANT'S RIGHT UNDER THE SIXTH AMENDMENT TO ALLOW APPELLANT TO DISMISS HIS COUNSEL DURING THE TRIAL OF HIS CASE.

There is no argument with the Appellant's proposition that the decision to waive counsel must be made intelligently and with full understanding of the implications forthcoming if he waives this Constitutional right of counsel guaranteed by the Sixth Amendment:

U.S. vs. Mitchell, 137 F.2d 1006, affirmed 138 F.2d 831 certiorari denied, 321 U.S. 794.

Smith vs. U.S., 216 F.2d 724

Likewise there can be no doubt that the Appellant has an unquestioned right to waive counsel and defend himself.

28 U.S.C.A. 1654.

Duke v. U.S., 255 F.2d 721.

Collins vs. O'Brien, 208 F.2d 44

U.S. vs. Mitchell, supra.

Adams v. U.S. rel. McCann, 317 U.S. 269, 63 S.Ct. 336, 87 L.Ed. 268, 143 A.L.R. 435.

Granting a defendant leave to dismiss counsel and conduct his own defense is within the Trial Court's discretion.

U.S. vs. Foster, 9 F.R.D. 367.

As stated in the case of *Johnson vs. Zerbst*, 304 U.S. 458,

"The determination as to whether there has been an intel-

ligent waiver of the right must depend in most cases upon the particular facts and circumstances surrounding that cases, including background, experience and conduct of the accused."

Obviously the trail judge is placed in a position to be the one to determine whether an intelligent waiver has been made as he is the only person having the opportunity to observe these particular facts and circumstances. The Government shall attempt to set forth some of the facts and circumstances that the trail court might have considered in allowing Appellant to waive counsel during the progress of his trail.

The Appellant's counsel was not court appointed as stated in Appellant's Brief, page 27. Appellant's counsel was of his own choosing and was present at his arraignment and the trail of his case. It was apparent from the commencement of the trail that Appellant was desirous of handling his own defense and was attempting to do so even during the time he was represented by counsel. Several indications of this follow:

Defendant aided in quetioning the jurors, R.T. 10. Appellant refused to answer questions asked by his own counsel. R.T. 43. He directed counsel in legal arguments. R.T. 50-54. Finally he attempted to take over the argument of several legal questions while he was still represented by counsel. Necessarily his actions and conduct were closely observed by the trial court. We quote from page 52 of the Reporter's Transcript to page 54 thereof.

"THE DEFENDANT: I believe Your Honor made the statement, they asked me if I wished to have the Information read to me and never mentioned if there was an indictment by the Grand Jury, or whether or not there was; the Information was given to the District Attorney for investigation.

"THE COURT: You were indicted by the Grand Jury and you pleaded not guilty to the indictment. You are now

on trial. No advantage has been taken of you. You are having your trial, and no body even asked you to waive indictment. Apparently they presented your case to the Grand Jury and you were indicted.

"THE DEFENDANT: Directing your attention then to July 3rd.

"THE COURT: Just a moment. I have discussed it all I am going to. You are represented by counsel. You have a right to counsel and you have counsel. Counsel will represent you. The reason for counsel is to give you the benefit of somebody who has knowledge of these things and knows the procedure and understands the technicalities of these things. I cannot educate you this morning or this noontime as to the criminal procedure. Mr. Macaluso, I will hear from you on anything you desire to present. You can consult with the defendant and present anything you want and I will let you make it on the record, but you will have to represent him as long as you are his counsel.

"THE DEFENDANT: May I make a motion before this Court to dismiss Mr. Macaluso as counsel and resume the responsibility of continuing further on my own?

"MR. MACALUSO: It is o.k. with me, Your Honor.

"THE COURT: I will grant you that right but you will have to bear in mind that if there is any untoward inference drawn by that from the jury, it is your responsibility.

"THE DEFENDANT: I am accepting that responsibility.

"THE COURT: I will also have to make it clear that you will have to proceed in accordance with the rules and the law and the procedures even though you may not have an acquaintance with them. If you transgress them, I will

have to stop you. You will have to bear responsibility for all that.

"THE DEFENDANT: That is perfectly all right.

"THE COURT: Very well. The Court will grant the request of the defendant to permit him to complete the trial as his own counsel. The Court will discharge Mr. Macaluso from further responsibility.

"MR. MACALUSO: I do not have to appear at 1:30, Your Honor?

"THE COURT: That is correct. I am going to explain to the jury, Mr. Watts, that by agreement with you, Mr. Macaluso has withdrawn and you will handle the argument yourself."

The Court in the case of *People vs. Linden*, 338 Pac. 2d 397 discusses a similar position taken by a defendant. In many respects it is comparable to the situation the trial court was confronted with in this case. Describing this defendant, the Court said,

"Most of the problems here presented arise because defendant from the inception of this lawsuit has taken the position that the right to counsel includes the right to a court-appointed attorney to act in such varying capacities as defendant may from time to time see fit to require, as attorney of record yet subject to defendant's direction, or as legal advisor, or as a mere clerk."

Appearing without counsel at the time set for sentencing, the Appellant filed with the Clerk a Motion to Appeal. At this time the trial court gave the Appellant the opportunity to have counsel but again Appellant requested the right to represent himself. R.T. 71.

If this Honorable Court will refer to the docket in the Ninth Circuit of this matter, it will note the Appellant has filed several motions without the aid of counsel with a degree of success. The facts just discussed certainly show that no deprivation of his rights existed. After being informed of the consequences of proceeding without the aid of counsel the Appellant requested that he finish the trial without counsel.

Presumably, if an accused during a trial decides that he wishes to proceed alone without delaying a trial and makes the decision with full knowledge of the risks he is taking, that course should be open to him in view of the fact he must have complete confidence in his counsel. *U.S. vs. Mitchell*, supra. Certainly, after a careful analysis of the instructions given by the trial court, R.T. 58, it is readily apparent that there was no lack of sufficient law or the application of any erroneous law. The Appellant admitted 3 previous felony convictions. R.T. 47. An instruction was given as to what weight should be given defendant's prior convictions. R.T. 62. Nor can the Appellant claim the court erred in not giving him sufficient time to prepare instructions or enter objections to those given. Once it is found that an accused has properly waived his right to counsel the effects flowing from the decision must be accepted by him together with the benefits he presumably sought to obtain therefrom. *Smith v. U.S.* 216 F.2d 724.

As stated in the case of *Burstein vs. U.S.*, 178 F.2d 665, p. 670,

"When appellant chose to proceed without counsel he chose a course of action fraught with the danger he would commit legal blunders. But having made the choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. It cannot be said that the Court denied him a fair trial because the judge refrained from intermeddling."

In the case *Earle L. Reynolds vs. U.S.*, No. 16249, decided by this Honorable Court June 1, 1959, which reversed the judgment of the District Court on the grounds that the District Court denied the Appellant's request to dismiss his counsel and represent himself, the Court stated:

"In our view the District Court erred, in the circumstances of this case, by denying Appellant the right to conduct his own defense."

The Appellant intelligently and with full understanding of the implications waived his constitutional right to counsel and was permitted by the trial court, after having been advised of the dangers to which he exposed himself, to do what the Appellant wished, namely, to finish the trial without assistance of counsel.

ARGUMENT OF SPECIFICATION OF ERROR NO. 2.

THE TRIAL COURT DID NOT COMMIT ERROR IN PERMITTING THE STATE OFFICERS TO TESTIFY TO VERBAL STATEMENTS VOLUNTARILY MADE BY APPELLANT AND IN PERMITTING THE ADMISSION INTO EVIDENCE OF APPELLANT'S WRITTEN CONFESSION. (Government's Exhibit 2)

Again, the facts and circumstances are of such importance in the discussion of this Specification of Error, that we feel it will aid this Honorable Court if we set them forth in some detail.

Appellant was stopped for speeding near Seligman, Arizona by Officer Williams of the Arizona Highway Patrol at approximately 2:30 o'clock P.M. May 15, 1957. R.T. 18, 25. At the time Appellant was stopped he was driving a 1956 Cadillac Convertible and there were two men traveling with him. R.T. 18. Appellant was unable to produce a valid driver's license or the registration to the car. R.T. 18, 19. The State Officer requested Appellant to follow him to the Sheriff's Office in Ashfork, Ari-

zona, R.T. 20, a distance of 23 miles. Upon arrival at the Sheriff's office Appellant stated the car belonged to his father, Robert Stern. Robert Stern was in fact the true owner of the stolen car and had never seen the Appellant prior to the trial. R.T. 11, 12. Upon arrival at the Sheriff's office in Ashfork, Arizona, the Appellant stated that the passengers were hitch-hikers he had picked up en-route and they knew nothing about him or the automobile. R.T. 20. The hitch-hikers were then interviewed and released by Officer Williams of the Arizona Highway Patrol. R.T. 20. After the Appellant learned the hitch-hikers had been released and were on their way, the Appellant changed his story and told the State Officers that the car was a stolen car but that one of the passengers released by the officers actually stole it. R.T. 21. This complete reversal of his previous story necessitated the Officers of the Arizona Highway Patrol to put out a call to pick up the hitch-hikers. R.T. 21. By the time the hitch-hiker were located they were in Flagstaff, Arizona, a distance of 50 miles from Ashfork. This required a trip to Flagstaff by one of the Arizona Highway Patrolmen to pick up the hitch-hiker implicated by Appellant and return with him to Ashfork. R.T. 32. Subsequently, when Appellant learned that the hitchhiker had been apprehended and returned to Ashfork he again reversed his story and exonerated the hitch-hiker, who was later released. R.T. 33, 34. The closest F.B.I. Agent to Ashfork is located in Prescott, Arizona, a distance of 53 miles. Sometime during the afternoon of May 15, 1957 the F.B.I. Agent at Prescott was notified of this matter by the State Officers and asked to ascertain if the Cadillac was reported as a stolen car, which he did. R.T. 20. However, there is nothing in the record that indicates he had any knowledge of any investigation made by the Arizona Highway Patrol, made any request of them, or collaborated with the State Officers as suggested in Appellant's Brief,

page 21, nor is there one scintilla of evidence to be found in the Reporter's Transcript to substantiate the statement in Appellant's Brief, page 21, that continued questioning occurred after the second release of the hitch-hiker. The conversation with Appellant testified to by State Officers are short and they were primarily made necessary by the Appellant's own actions. The Appellant in fact complained of being left alone. Appellant's Brief, page 22. On May 16, 1957, the day following Appellant's apprehension, Appellant was moved to Prescott, Arizona where he was turned over to Jeff Laird, Special Agent, Federal Bureau of Investigation. He was then taken before the United States Commissioner, R.T. 36. At the Commissioner's hearing the Appellant voluntarily admitted his guilt as shown by Report of Proceeding before Commissioner, a part of the record herein. No statement was taken by any Federal Officers prior to Appellant's appearance before the Commissioner. Immediately following the hearing a written statement, Exhibit 2, was made by the Appellant to the F.B.I. Agent. R.T. 36. Any delay prior to Appellant's appearance before the Commissioner was largely caused by Appellant's behavior and not by any State or Federal Officer.

The above related set of facts is so far removed and distinguishable from the facts in *McNabb vs. U.S.*, 318 U.S. 332, *Upshaw vs. U.S.*, 335 U.S. 40, *Mallory vs. U.S.* 354 U.S. 459 and *Anderson vs. U.S.* 318 U.S. 350, the chief cases relied upon by the Appellant that as applied to this case they lose all their significance and do not support the Appellant's position

The Transcript of the Record shows that no objection was made prior to the trial or during the trial to the introduction into evidence of the conversations between the State Officers and Appellant. R.T. 21, 22, or to the admissibility of Exhibit 2, R.T. 33. Objections to the use of evidence which it is claimed was illegally

obtained must be seasonably made or the right thereto will be lost.

Garhart vs. U.S. 157 F.2d 777, citing *Gould vs. U.S.* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 467.

Another very important distinction which makes the cases which support the McNabb Rule, relied upon by Appellant, inapplicable is that if the detention of the Appellant was unlawful he was detained by State Officers not acting in collaboration with Federal Officers and the statements, therefore, made by the Appellant prior to his arraignment before the United States Commissioner were not the fruits of any wrongdoing by Federal Officers. The only mistreatment claimed by the Appellant consisted of being left alone without cigarettes. R.T. 29, 32. Appellant's Brief 22.

In *Horne vs. U.S.*, 246 F.2d 83, page 85, the Court said,

"There was no error in admitting either confession against Appellant. The objection upon the grounds that each confession was obtained before Appellant was carried before a committing magistrate was not well taken for several reasons. According to the Sheriff, Appellant had orally confessed within a few hours after his arrest. There was creditable testimony that Appellant was not mistreated and that the confessions were reduced to writing by noon of the next day. Further, we have held that the McNabb Rule does not apply when accused is detained by State Officers. *Brown vs. U.S.* 228 F.2d 286."

We find the same principle discussed in the case of *Stephenson vs. U.S.*, 257 F.2d 175, 176.

"Although Appellant was in custody some 13 days after his arrest and before he was taken before a United States Commissioner, he was not in Federal custody during that period. He was arrested under Federal Warrant July 25 at

which time he was immediately taken before a Commissioner. Under facts in this case *McNabb vs U.S.*, supra, *Anderson vs. U.S.*, supra, and *Mallory vs. U.S.* supra, are not applicable."

The Appellant attempts to imply that the F.B.I. Agent in the case collaborated with the State Officers, Appellant's Brief 21. As previously stated, the Transcript of Proceedings does not substantiate this position. Collaboration for this purpose requires active participation or active direction by Federal Officers with the State Officers *Bayer vs. U.S.* 273 U.S. 28, *Garhart vs. U.S.*, supra, *Anderson vs. U.S.* supra.

The McNabb rule is inapplicable when unlawful detention is by State Officers not acting in collaboration with Federal Officers.

Brown and Hoage vs. U.S., 228 F.2d 286.

Anderson vs. U.S., 318 U.S. 350.

White vs. U.S., 200 F.2d 509, 512, 513, Certiorari denied 345 U.S. 999, 73 Sup. Ct. 1142, 97 L.Ed 1405.

U.S. vs. Harris, 211 F.2d 656, 660.

At the time of his oral admission, the Appellant was legally in the custody of State Officers and was not charged with a Federal offense. Clearly his admissions were not "use by Government of erroneous doing by its officers." *Lambert vs. U.S.*, 261 F.2d 799.

There can be no question about the admissibility of the written statement made to the F.B.I. Agent. It was taken several hours after the verbal statements were made to the State Officers, and after Appellant had been before a Commissioner and verbally admitted his guilt. There is not even a suggestion by Appellant that he was coerced, frightened or intimidated in any way prior to or during the time he made his statement to the F.B.I. Agent.

CONCLUSION

After a review of the questions raised, it readily becomes apparent that Appellant was not deprived of any fundamental or constitutional right and that he received a fair and impartial trial. The facts clearly reveal that Appellant's own statements and acts perpetrated the very things he now claims deprived him of his fundamental rights. It is respectfully urged that the judgement of conviction be affirmed.

Respectfully submitted,

Jack D. H. Hays
United States Attorney
For the District of Arizona

Mary Anne Reimann
Assistant United States Attorney

Attorneys for Appellee

No. 16301 /

United States
Court of Appeals
for the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.
and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

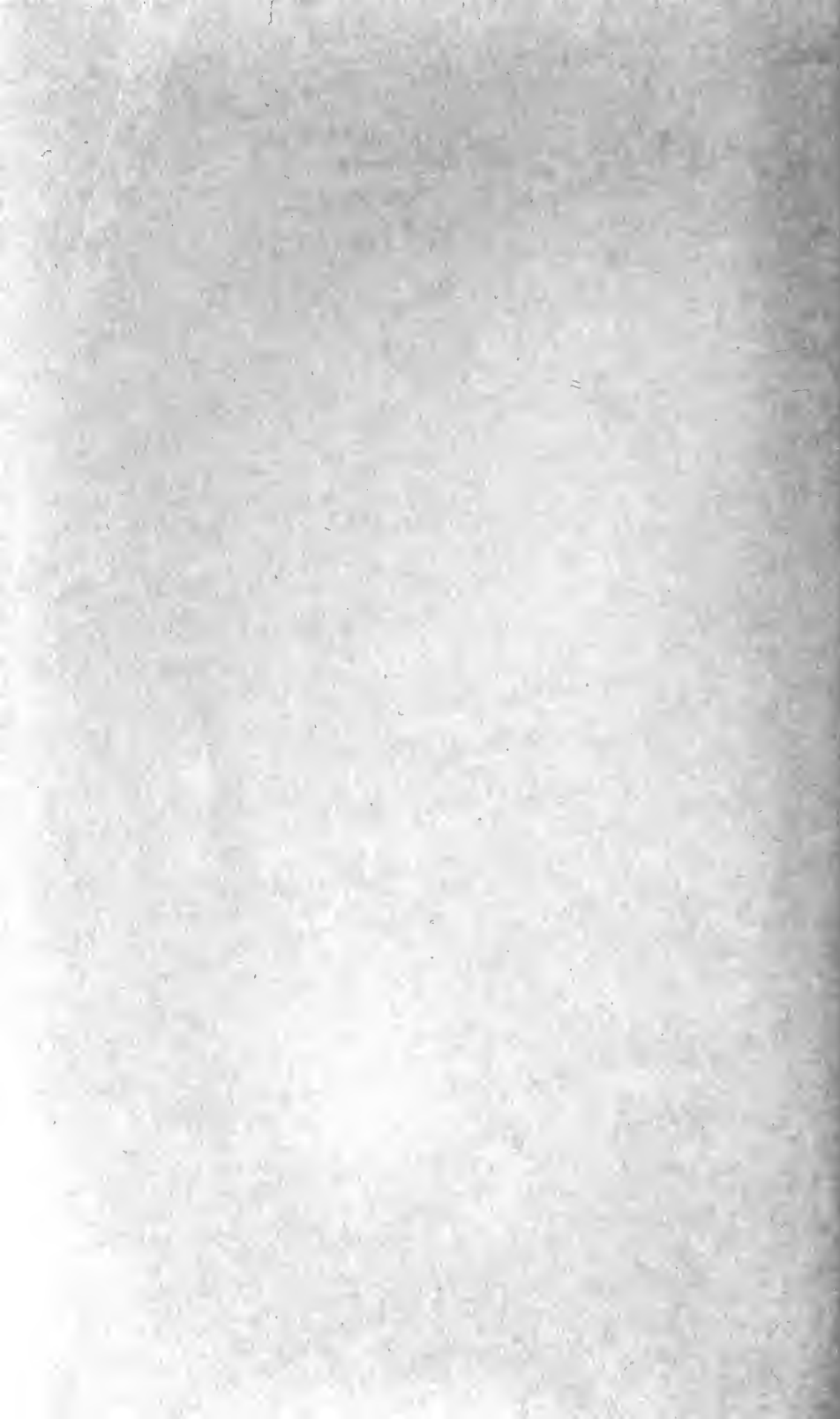
vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors,
Respondents.

Transcript of Record

Petition to Review and Petition to Enforce Order of the
National Labor Relations Board

PAUL P. O'DWYER, CLERK



No. 16301

United States
Court of Appeals
for the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.
and

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION and B. PERINI & SONS, d/b/a Kings River Constructors, Respondents.

Transcript of Record

Petition to Review and Petition to Enforce Order of the
National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT 1-E

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1288

MORRISON - KNUDSEN, INC., HENRY J.
KAISER, and B. PERINI & SONS, d/b/a
KINGS RIVER CONSTRUCTORS, and
M. E. TUTTLE, An Individual.

COMPLAINT AND NOTICE OF HEARING

It having been charged by M. E. Tuttle, an individual, (herein called Tuttle), that Morrison-Knudsen, Inc., Henry J. Kaiser, and B. Perini & Sons, d/b/a Kings River Constructors (herein called Employer), has engaged in, and is now engaging in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, (herein called the Act), the General Counsel of the National Labor Relations Board, (herein called the Board) on behalf of the Board, by the undersigned Acting Regional Director for the Twentieth Region, hereby issues this Complaint and Notice of Hearing, pursuant to the provisions of Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 6, as amended.

General Counsel's Exhibit 1-E—(Continued)

I.

On or about May 9, 1957, the above charge was duly served on the Employer, and on or about June 7, 1957, a first amended charge was duly served on the Employer.

II.

Morrison-Knudsen, Inc. (a Delaware corporation), Henry J. Kaiser (a Nevada corporation), and B. Perini & Sons (a California corporation), are, and were at all times material herein jointly engaged in a venture under the name and title of Kings River Constructors, for the construction of a power house pursuant to a contract with the Pacific Gas and Electric Company of California on the Kings River in the State of California. Total cost of said construction will be in excess of \$1,500,000.

The Employer, during the calendar year ending December 31, 1956, made total purchases of products and supplies received directly from outside the state in excess of \$500,000.

Morrison-Knudsen, Inc., Henry J. Kaiser, and B. Perini & Sons, the three companies engaged in the joint venture known as Kings River Constructors, did each receive during the calendar year ending December 31, 1956, total gross receipts from construction projects outside the State of California in excess of \$50,000, each of the said corporations is part of a multi-state enterprise, and the total receipts from projects outside the state by each such multi-state enterprise during the aforesaid calendar year are in excess of \$250,000.

General Counsel's Exhibit 1-E—(Continued)

III.

Respondent Employer is, and at all times referred to herein has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV.

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act.

V.

Commencing on or about February 23, 1957 and at various times thereafter, the Employer, by and through its representatives Bert Perkins, J. T. Wolcott, and John E. Atkins, advised Tuttle that a job was available or would be available at Employer's Black Rock project if Tuttle could obtain work clearances from the Union.

Thereafter Tuttle endeavored to obtain such clearances from the Union for work at the Black Rock project, but such clearances were at all times denied to him by the Union.

The Employer at all times declined to employ Tuttle on any job at the Black Rock project without such clearances from the Union.

VI.

By the acts set forth in paragraph V, above, the Employer did discriminate, and is now discriminating against Tuttle in regard to his hire, tenure,

General Counsel's Exhibit 1-E—(Continued)
terms and conditions of employment, thereby encouraging membership in the Union, and did thereby engage in, and is now engaging in unfair labor practices within the meaning of Section 8 (a)(3) of the Act.

VII.

By the acts set forth in paragraph V, above, the Employer did interfere with, restrain, and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Please Take Notice that on the 24th day of February, 1958, at 10 o'clock in the forenoon in the Council Chambers of the City Hall, Fresno, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of a verified answer to said Complaint within ten (10) days from the service thereof, and that unless you do so all of the allegations in the

General Counsel's Exhibit 1-E—(Continued)

Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for the Twentieth Region, on this 27th day of December, 1957, issues this Complaint and Notice of Hearing against Morrison-Knudsen, Inc., Henry J. Kaiser, and B. Perini & Sons, d/b/a Kings River Constructors, Respondent named herein.

[Seal] /s/ LOUIS S. PENFIELD,
 Acting Regional Director, Na-
 tional Labor Relations Board.

GENERAL COUNSEL'S EXHIBIT 1-G

[Title of Board and Cause.]

ANSWER TO COMPLAINT

Comes now Kings River Constructors by and through its sponsor and managing partner, Morrison-Knudsen Company, Inc., and for answer to the complaint in the above entitled case and pursuant to the notice of hearing submits the following answer to the charges made:

I.

Respondent admits the allegations of Section I of said complaint.

II.

Answering Section II of said complaint, Respondent states that it is a joint venture (a partner-

General Counsel's Exhibit 1-G—(Continued)

ship for the time being) composed of Morrison-Knudsen Company, Inc. (a Delaware corporation), Henry J. Kaiser Company (a Nevada corporation), Macco Corporation (a Nevada corporation) and B. Perini & Sons, Inc. (a Massachusetts corporation) and Respondent admits that it is doing business of sufficient volume to meet the jurisdictional "yard-sticks" of the National Labor Relations Board.

III.

Respondent admits the allegations of Section III of the complaint.

IV.

Section IV of said complaint relating solely to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, Respondent makes no answer thereto.

V.

Respondent denies each and every allegation of each and every paragraph included in Section V of said complaint and the whole thereof.

VI.

Respondent denies each and every allegation contained in Section VI of the complaint and the whole thereof.

VII.

Respondent denies each and every allegation set forth in Section VII of the complaint and the whole thereof.

General Counsel's Exhibit 1-G—(Continued)

Wherefore, having fully answered the charges and allegations as set forth in the complaint herein, Respondent Kings River Constructors respectfully prays that said complaint be dismissed.

KINGS RIVER CONSTRUCTORS,
By MORRISON-KNUDSEN COM-
PANY, INC.,
/s/ CARROLL F. ZAPP,
Vice President.

THOMAS L. SMITH and
PAUL B. PUSEY,
/s/ THOMAS L. SMITH,
Attorneys for Respondent, Kings
River Constructors.

Duly Verified.

Certificate of Mailing Attached.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

On the duly issued complaint of the General Counsel of the National Labor Relations Board, alleging in substance that the Respondent herein, in violation of Section 8 (a) (1) and (3) of the Act, declined to employ one M. E. Tuttle, the charging party herein, because he was unable to obtain clearance from International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

Local No. 431 (hereinafter Teamsters, Local 431, or the Union), a hearing was held before the undersigned Trial Examiner at Fresno, California, February 24, 25, 1958. In its duly filed answer the Respondent denied the commission of the alleged unfair labor practices. All parties were represented at the hearing, participated therein, and were afforded full opportunity to be heard, to examine and cross examine witnesses, and to introduce evidence on the issues. The Respondent availed itself of the privilege accorded all parties to file a brief.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

Morrison-Knudsen, Inc. (a Delaware corporation), Henry J. Kaiser (a Nevada corporation), Macco Corporation (a Nevada corporation), and B. Perini & Sons (a Massachusetts corporation), are, and were at all times material herein jointly engaged in a venture under the name and title of Kings River Constructors, for the construction of a power house pursuant to a contract with the Pacific Gas and Electric Company of California on the Kings River in the State of California. Total cost of said construction will be in excess of \$1,500,000. During the calendar year ending December 31, 1956, the Respondent made total purchases of products and supplies received directly from outside the State, in excess of \$500,000. Each of the aforementioned corporations engaged in the joint venture

known as Kings River Constructors, received during the calendar year ending December 31, 1956, total gross receipts from construction projects outside California in excess of \$50,000; each is part of a multi-State enterprise; and the total receipts from projects outside California by each such multi-State enterprise during the aforesaid calendar year were in excess of \$250,000.

On these stipulated facts jurisdiction is admitted and found.

II. The labor organization involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

M. E. Tuttle worked for several years as a warehouse clerk in Oregon and California on construction projects in which Morrison-Knudsen was engaged in a joint venture with other companies or as a sponsoring partner. On or about November, 1956, he quit his employment on a project near Sonoma, California, in order to have some dental work done at Stockton, California, where he established residence. On his last job he had had his membership in Teamsters transferred to Local 439, Stockton.

After Christmas, 1956, he began seeking employment and on or about February 22, 1957, visited a friend, Jack Sharp, at the latter's home in Friant, close to Fresno, California. Sharp, with whom he

had worked on construction projects, was at that time employed as a warehouse clerk by Kings River Constructors (of whom Morrison-Knudsen was the sponsoring partner) on what was known as the Black Rock project, some 60 miles from Fresno. Sharp informed Tuttle that he was about to be transferred to the Wishon Dam project, on which he had worked previous to being assigned to Black Rock, and suggested that Tuttle might replace him at Black Rock.

On the following day, Sharp accompanied Tuttle to Fresno where they saw Bertram Lucian Perkins, project manager at Wishon, who had arranged for Sharp's transfer. Sharp recommended Tuttle to replace him at Black Rock and Perkins, who had known Tuttle on prior construction jobs, advised the latter to get his union card cleared by Teamsters Local 431 in Fresno. According to Tuttle's credited testimony, Perkins warned him that he might have some trouble with Al Fudge, secretary of Local 431, inasmuch as the latter might not want to accept the transfer of Tuttle's card from the Stockton local.¹

Tuttle testified that Perkins told him to present

¹ Sharp testified that Perkins asked Tuttle how he was "set up" with the Teamsters, and when Tuttle replied that he was still a member, advised him to get his card in with the Fresno local and to "make himself right with the union in Fresno." Perkins denied that he told Tuttle he would have to clear with the Teamsters, but admitted that he "probably told him to see the union * * * That would be the normal procedure."

himself at Black Rock on the following Monday. Sharp testified that when he recommended Tuttle to replace him at Black Rock, Perkins "seemed to think that was all right." Perkins denied that he instructed Tuttle to report on the job and testified that he had no authority with respect to hiring personnel at Black Rock. Contrary to Tuttle's testimony, the project manager at Black Rock was not Perkins but Jack DeLay. Tuttle assumed that Perkins had authority at Black Rock because he had arranged for Sharp's transfer, but Perkins' actual authority in recruiting personnel was limited to the Wishon Dam job.²

Following his interview with Perkins, at the latter's suggestion, Tuttle went to the Fresno office of Kings River Constructors and put his application on file with James Thomas Wolcott, the labor coordinator for both the Black Rock and Wishon projects. Tuttle testified that Perkins accompanied him to Wolcott's office, and Wolcott being occupied at the time, had Wolcott's secretary register Tuttle's application for the warehouse job at Black Rock.³

² It is clear from Sharp's testimony that there was a considerable exchange of employees between the Black Rock and Wishon Dam projects, some twenty miles apart, and while technically each project had its own manager in charge of personnel there doubtless was very close cooperation between the two, and Wolcott regarded both Perkins and DeLay as his superiors.

³ Perkins did not recall having accompanied Tuttle to Wolcott's office but admitted that he may have done so, and Tuttle was firm in his testimony on the point.

The fact that Tuttle placed his application on file at Wolcott's office after talking with Perkins is a circumstance corroborative of Perkins' denial of an actual job offer. I think what actually happened was that when Sharp recommended Tuttle to Perkins, the latter assumed that Tuttle would fill the vacancy, or, in Sharp's words, "seemed to think that was all right," and this, together with his recommendation that Tuttle clear with the local union, gave rise to Tuttle's assumption that Perkins was actually assigning him to the job.

On the following day, a Sunday, Tuttle, thinking that he had been promised the Black Rock job, moved the trailer in which he was living to Friant, and on Monday went to the Fresno office of Local 431 where he saw Fudge, the local's secretary. He handed Fudge his union card and told him that Perkins had instructed him to report for work at Black Rock that day. Fudge did not want to accept the transfer of Tuttle's card from the Stockton local, told Tuttle that he already had more warehousemen that he could do anything with, and refused to clear him for the Black Rock job. Despite his failure to get union clearance, Tuttle then went to the Black Rock project and arrived there sometime in the afternoon of February 25.

On the Black Rock job, Sharp introduced him to John E. Atkins, warehouse manager at Black Rock. Atkins informed Tuttle that there must be some mistake because Wolcott had someone else coming on the job. He advised Tuttle to see Wolcott.

Atkins testified that prior to February 25 he had

been advised by Sharp of the latter's transfer to Wishon, and that Sharp had recommended Tuttle to replace him at Black Rock. Atkins admitted that he thereupon requested Tuttle by name as a replacement for Sharp and testified that he made the request through Weatherman, office manager and Atkins' immediate superior — his usual procedure in obtaining warehouse personnel. Atkins also told Sharp to have Tuttle "contact" him. He did not know Tuttle personally but knew of him because of work on prior projects. According to Atkins, there was some delay in Tuttle's reporting for the Black Rock job and in the interim the vacancy had been filled by the hiring of one Myers. This testimony, as will be seen, is not consistent with that given by Wolcott.

After his interview with Atkins, Tuttle saw Wolcott. According to him he saw Wolcott at the project immediately after talking with Atkins. According to Wolcott, he first met Tuttle when the latter came to his Fresno office on Tuesday, February 26. He testified that he had been informed by his secretary that Tuttle had been in the office the previous day, and Tuttle admitted that it might have been Monday, February 25, when he filed his application at Wolcott's office. Be that as it may, when they met Tuttle informed Wolcott that Perkins had assigned him to the Black Rock job and Wolcott replied that Perkins had no authority over personnel at Black Rock. According to Tuttle, Wolcott informed him that he had already called a man for the warehouse job at Black Rock. This would accord with what he

had been told by Atkins. According to Wolcott, he informed Tuttle that there was no vacancy at Black Rock and that he would be contacted if later there was a job opening. During this interview, Tuttle volunteered to Wolcott that he was having difficulty in getting cleared through Local 431.

According to Wolcott, it was after his interview with Tuttle that he was asked by DeLay, Black Rock project manager, to "get him a good warehouseman," whereupon he got in touch with Fudge and Fudge said that he had a good one, to which Wolcott replied, "Fine. Send him up." Myers was thereupon hired through the Union to fill the vacancy caused by Sharp's transfer. The records indicate that Myers was hired on February 28 and that he went to work as a warehouse clerk at Black Rock during the first week in March. Obviously, therefore, Atkins' testimony that Myers had already been hired when Tuttle first approached him about the job, was erroneous, and why, on February 25, he should have advised both Sharp and Tuttle that the job was filled, invites speculation. Respondent's witnesses provided no explanation.

Tuttle, apparently having learned of the identity of the person hired to fill the vacancy shortly to be caused by Sharp's transfer, went to Fudge's home one evening to protest his clearance of a man whom Tuttle "understood had never belonged to the Union," while denying clearance to Tuttle. Fudge became angry at Tuttle's invasion of his privacy, and told Tuttle that he should leave his, Fudge's,

blankety blank business alone and not to come to his house again.

Despite his failure to obtain union clearance, Tuttle continued his efforts to obtain work at Black Rock. He repeatedly saw Wolcott but received no encouragement for future employment.

On about March 6 or 7 he again saw Atkins at the project. Atkins testified that on this, as on the former occasion when he saw Tuttle, he advised the latter that the vacancy caused by Sharp's transfer had been filled and that there was no job opening. According to Tuttle, on this occasion Atkins also told him that he had asked for Tuttle by name to fill the Sharp vacancy and had been advised that Tuttle was not eligible for the job because the Union refused to clear him. Tuttle further testified that Atkins told him he had called Fudge with respect to clearing Tuttle and Fudge had replied that Tuttle was not available for any job at Black Rock. Atkins, according to Tuttle, advised him to "get right" with the Union. Atkins denied that he called Fudge with respect to employing Tuttle or that he advised Tuttle to clear with the Union. He admitted that Tuttle told him of his difficulties with Fudge. Leon Maples, a warehouse clerk at Black Rock, testified that he overheard Tuttle tell Atkins of his belief that Fudge was responsible for his failure to get the Black Rock job, and heard Atkins reply that he had put in a "requisition" for Tuttle by name before Myers was hired, and that Wolcott said that Tuttle was not available. I am satisfied that whether or not he told Tuttle that he had per-

sonally called Fudge and that Fudge had refused to clear Tuttle for the job, he conveyed the information to Tuttle that Tuttle had failed to get the Black Rock job because of Fudge's refusal to clear him and advised Tuttle to "get right" with the Union. Tuttle's testimony on these points was convincing. Atkins was not a reliable witness, but on the contrary was evasive, and, I am reasonably certain, withheld facts within his knowledge on Tuttle's rejection as a replacement for Sharp.

After some two weeks' employment at Black Rock, Myers, hired to fill the Sharp vacancy, quit or was discharged, and a new employee, Ryan, was hired to take his place. Atkins had worked with Ryan previously and although he testified, in effect, that his role in the hiring of warehouse employees was restricted to recommendations channeled through his superior, Weatherman, he admitted, with respect to Ryan, that he personally called the Los Angeles office where Ryan was then employed to learn whether Ryan would be available to work at Black Rock. On being advised of Ryan's availability, he informed Weatherman that he would like to have Ryan as a warehouse clerk "because he had worked for me off and on for the last ten years." Ryan was immediately hired.

Both Ryan and Myers were cleared through Local 431.

Early in April, Wolcott, on being informed that Maples was resigning, called Tuttle by telephone and told him of the vacancy and informed Tuttle that he had him "in mind" to fill it, and that he

would be contacted later with respect to it. Wolcott testified that he refused Tuttle's application for the vacancy caused by Sharp's transfer because of Tuttle's age—70 years—and because of his attitude and background, but later made the tentative offer upon being advised that Atkins wanted him. He denied that at the time he hired Myers he had been advised that Atkins wanted Tuttle for the job. Wolcott admitted that before making Tuttle a tentative offer, he discussed the matter with Fudge and that Fudge told him, in effect, that the decision was up to him. The vacancy caused by Maples' resignation was not filled, however, because of the discontinuance of the night shifts and Tuttle was never actually employed by Kings River Constructors.

Summarization and Conclusions

Tuttle applied for a job as warehouse clerk at Black Rock on being advised by his friend Sharp that the latter was being transferred to Wishon. Sharp recommended Tuttle as a replacement to Atkins, warehouse manager at Black Rock and Atkins, who was acquainted with Tuttle's work, asked for Tuttle by name as a replacement for Sharp. Absent an explanation of why he was not informed in the matter, contrary to Wolcott's testimony, I am convinced that Wolcott had knowledge of Atkins' recommendation. Atkins' status as a supervisor with authority effectively to recommend in matters of hiring and discharging, was stipulated. He testified that his recommendations on hiring were effective only about half the time but the only

specific mention of being overruled was with respect to the hiring over his objections of the son of his immediate supervisor, Weatherman. Admittedly, Maples was hired on his recommendation, and in the hiring of Ryan he took the initiative, himself ascertaining that Ryan was available and thereafter obtaining his employment through Weatherman. In the case of Tuttle, however, his recommendation was ignored or, at least, not followed, and Myers was hired instead, not on the strength of anybody's recommendation but through clearance with Fudge. Contrary to Atkins' testimony, and on Wolcott's testimony, Myers had not been hired at the time Tuttle presented himself at the Black Rock project, nor later when Tuttle applied to Wolcott. Why was Myers requisitioned for the job through the Union, when Tuttle had Atkins' recommendation and was available? I think there can be but one answer. Tuttle could not get union clearance and had aroused Fudge's antagonism. Wolcott's explanation that he was not impressed with Tuttle because of the latter's age and manner of putting himself forward rings false in view of Wolcott's testimony that he later—after he had talked to Fudge and gained at least Fudge's acquiescence—called Tuttle and told him he had him in mind for hiring at Black Rock. True, according to the testimony, Atkins had again asked for Tuttle, but he had requested Tuttle in the first instance and his request had been ignored. Tuttle was no younger in April than he was in February and I doubt if his disposition had undergone any major change in

the interim. He had worked previously on Morrison-Knudsen construction jobs and his work must be deemed to have been satisfactory inasmuch as Atkins, who knew of his work, requested him and no evidence was presented to show that he was not competent or that the Respondent had any reason to believe that he was not competent.

Fudge did not testify and Wolcott denied that he talked to Fudge with respect to Tuttle before hiring Myers. Wolcott, however, knew that Tuttle was in trouble with the Union because Tuttle told him about his difficulty with Fudge. When Maples attempted to ascertain from Fudge why Tuttle was not cleared for employment at Black Rock, Fudge replied sarcastically that he could not have such a young man telling him, Fudge, how to run his business. And while Wolcott denied that clearance with the Union was required for employment with the Respondent, clearly this was the practice. Perkins advised Tuttle to clear with Fudge because this was the "usual procedure," and Perkins was in a position to know. Atkins in a sworn pre-trial statement expressed his view that applicants for employment were required to clear with the Union. While he sought to modify this statement by testifying that this was merely his "impression," and that it had no basis other than conversations with various non-managerial employees, I think he was in a position to know and did know from experience that this was a customary requirement. Both men hired as warehouse clerks after Tuttle applied for the job, had union clearance and, as previously stated, one

of them, Myers, was directly requisitioned through the Union.

One of Wolcott's functions as labor coordinator was to establish and maintain friendly relations with the local unions. Preliminary to starting the Black Rock project, he met with local union representatives to discuss with them manpower requirements on the project and contemplated conditions of employment. There was of course nothing reprehensible about this. Construction projects such as this could not function efficiently, and probably not at all, without the cooperation of the unions, inasmuch as it normally would be necessary to recruit some and perhaps most of the manpower requirements through the local unions, and work stoppages could be ruinous. This is the historical situation in the construction industry where closed shop conditions have long prevailed. Law that runs contrary to custom is not readily accepted. But however understandable the Respondent's desire to obtain and maintain the cooperation of the local unions, and however much its present action fits into the historical pattern, its denial of a job to Tuttle because the latter incurred Fudge's displeasure and was therefore unable to obtain union clearance, was discriminatory and violative of Section 8 (a) (1) and (3) of the Act. It is so found.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the

operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found that the Respondent refused M. E. Tuttle employment because he was unable to obtain union clearance, thereby discriminating against him, it will be recommended that Respondent offer him employment in a position substantially equivalent to that in which he would have been employed except for his failure to obtain union clearance, with such seniority and other rights and privileges as would have accrued had he not been discriminatorily denied employment, and make him whole for any loss of pay suffered because of the discrimination against him, by payment to him of a sum of money equal to what he normally would have been paid in Respondent's employ from the date when he was first discriminatorily denied employment, to the date of Respondent's offer of employment, less his net earnings during said period and any money he may already have been paid because of Respondent's discrimination against him.⁴ Loss of pay shall be

⁴ There was evidence to the effect that a settlement on a charge filed by Tuttle against Local 431, involving the payment of a sum of money to Tuttle by Local 431, had been effectuated prior to the hearing in this proceeding.

computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By refusing employment to M. E. Tuttle because of his failure to obtain clearance from the aforementioned labor organization, thereby encouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By the said discriminatory refusal of employment to M. E. Tuttle, the Respondent interfered with, restrained and coerced its employees, and potential employees, in the exercise of rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that

Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation, and B. Perini & Sons, d/b/a Kings River Constructors, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) By refusal of employment or in any like or related manner, encouraging membership in Teamsters Local 431, or any other labor organization;

(b) In any other manner interfering with, restraining, or coercing employees, or applicants for employment, in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer M. E. Tuttle immediate employment in a position equivalent to that in which he would have been employed on or about February 28, 1957, except for his failure to obtain union clearance, with such seniority and other rights and privileges as would have accrued to his benefit had he been employed on or about that date, and make M. E. Tuttle whole in the manner, according to the method, and under the conditions set forth in Section V above, entitled "The remedy";

(b) Post in conspicuous places, including places where notices to employees are customarily posted, at its office in Fresno, California, and on the site of its Black Rock project, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Di-

rector for the Twentieth Region of the Board, shall, after being signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply with the foregoing recommendations.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated this 12th day of May 1958.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

APPENDIX

Notice to All Employees: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees and applicants for employment that:

We Will Not require clearance through International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, or any other labor organization, as a condition of employment or in any like or related manner discriminate in regard to hire and tenure of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees, or applicants for employment, in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will offer M. E. Tuttle employment previously denied him because of his failure to obtain clearance through the above-named labor organization, and make him whole for any loss of pay he

suffered as a result of the discrimination against him.

Morrison-Knudsen, Inc., Henry J. Kaiser, Macco
Corporation, and B. Perini & Sons, d/b/a
Kings River Constructors,
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENT, KINGS RIVER CONSTRUCTORS TO INTERME- DIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Come now the Respondent, Kings River Constructors, and herewith and hereby files its exceptions to the Intermediate Report and Recommended Order of the Trial Examiner entered in the above entitled case on the 12th day of May, 1958, as follows:

Findings of Fact

Exception No. 1

Respondent excepts to the statement and findings of the Trial Examiner appearing on page 2, lines 48-60, which provides:

"According to Tuttle's credited testimony, Perkins warned him that he might have some trouble with Al Fudge, secretary of Local 431, inasmuch as the latter might not want to accept the transfer of Tuttle's Card from the Stockton local.¹

for the reasons, among others, that:

(1) Such finding and statement is contrary to the weight of evidence and to fact.

(2) That the Trial Examiner has quoted Mr. Perkins' statement out of context which should read, "I probably told him to see the union. And I probably told him to see Jim Wolcott. That would be the normal procedure." (Tr. 132, 15-17)

The inference (and apparent finding) drawn by the Trial Examiner from the sentence "That would be the normal procedure" would apply with equal, if not greater force, to the statement omitted by the Trial Examiner, "And I probably told him to see Jim Wolcott."

Exception No. 2

Respondent excepts to all references to the testimony of the Charging Party, Mr. M. E. Tuttle, appearing in the Intermediate Report and Recom-

¹ Sharp testified that Perkins asked Tuttle how he was "set up" with the Teamsters, and when Tuttle replied that he was still a member, advised him him to get his card in with the Fresno local and to "make himself right with the union in Fresno." Perkins denied that he told Tuttle he would have to clear with the Teamsters, but admitted that he "probably told him to see the union * * * That would be the normal procedure."

mended Order on page 3, lines 1-37, page 4, lines 7-22; page 4, lines 37-47, 52-59; page 5, line 11; and to any use or reference thereto upon the grounds among others that:

(1) The Charging Party and witness, Tuttle, was shown to be a member of the Teamsters Union, and hence his testimony was inadmissible to show and did not purport to show any claimed preference or discrimination on his behalf by the Union of which he was member, or by the Respondent because of his membership or because of any connections the Respondent might have had with the Union.

(2) The matter of discrimination caused or encouraged by a Union on behalf of or against its own member is not within the purview or protection of the National Labor Relations Act.

Exception No. 3

Respondent excepts to the statement and finding of the Trial Examiner appearing on page 4, lines 1-5, which provides:

“According to Atkins, there was some delay in Tuttle’s reporting for the Black Rock job and in the interim the vacancy had been filled by the hiring of one Myers. This testimony, as will be seen, is not consistent with that given by Wolcott.”

for the reasons, among others, that:

(1) The conclusion drawn by the Trial Examiner that “This testimony as will be seen is not consistent with that given by Wolcott” is contrary to all other evidence.

(2) It affirmatively appears from the testimony

of Tuttle himself that the vacancy for which Myers was hired had been filled at the time Tuttle first appeared at the project, Monday, February 25, 1957, and Tuttle was advised that the vacancy had been filled on that date. It further appears that Tuttle was aware of the identity of the individual (although perhaps not the name) who filled the vacancy and went immediately from the project site to Mr. Fudge's home in Fresno (Tr. 65, 3-25; Tr. 66, 1-26; Tr. 67, 1-3)

Exception No. 4

Respondent excepts to the finding and conclusion of the Trial Examiner appearing on page 4, lines 31-35, which provides:

"Obviously, therefore, Atkins' testimony that Myers had already been hired when Tuttle first approached him about the job, was erroneous, and why, on February 25, he should have advised both Sharp and Tuttle that the job was filled, invites speculation. Respondent's witnesses provided no explanation."

on the grounds and for the reasons that:

(1) Respondent is under no duty to provide an explanation for what the Charging Party and his witnesses testify.

(2) It is not competent for the Trial Examiner to conclude that his inference is exclusive of any other reasonable inference which may be drawn. On the contrary, the record is quite clear that a commitment had been made for the hire of a replacement and the fact that the replacement did not

sign an employment card until February 28, 1957, or commence work until the first week of March is not material or pertinent.

Exception No. 5

Respondent excepts to the finding and conclusion of the Trial Examiner appearing on page 4, lines 45-47, which provides:

“Despite his failure to obtain union clearance, Tuttle continued his efforts to obtain work at Black Rock. He repeatedly saw Wolcott but received no encouragement for future employment.”

for the reason that:

(1) It is directly contrary to undisputed evidence that at no time did the Respondent request union clearance for Mr. Tuttle and there was, therefore, no reason for union clearance.

(2) The Trial Examiner found (page 5, lines 30-33):

“Early in April, Wolcott, on being informed that Maples was resigning, called Tuttle by telephone and told him of the vacancy and informed Tuttle that he had him ‘in mind’ to fill it, and that he would be contacted later with respect to it.”

(3) Such finding and conclusions are contrary to and unsupported by the evidence.

Exception No. 6

Respondent excepts to the statement appearing on page 6 of the Intermediate Report, lines 2-4, which provides:

“In the case of Tuttle, however, his recommen-

dation was ignored or, at least, not followed, and Myers was hired instead, not on the strength of anybody's recommendation but through clearance with Fudge."

upon the grounds, among others, that such finding and statement is contrary to the weight of evidence and fact.

Exception No. 7

Respondent excepts to the finding and conclusion of the Trial Examiner on page 6, lines 31-34, reading:

"And while Wolcott denied that clearance with the Union was required for employment with the Respondent, clearly this was the practice. Perkins advised Tuttle to clear with Fudge because this was the 'usual procedure,' and Perkins was in a position to know."

on the grounds, among others, that:

(1) Such finding and statement is contrary to the weight of evidence and fact.

(2) The Trial Examiner has found that Perkins was Project Manager on an entirely different project and was employed by an entirely different employer. (Page 2, lines 44-52; page 3, lines 1-10)

There is no proof or testimony which would support the finding or inference that the practice or "usual procedure" of Kings River Constructors was the practice or "usual procedure" which Mr. Perkins followed as Project Manager for Morrison-Walsh-Perini on that firm's Wishon Dam Project.

Exception No. 8

Respondent excepts to the statement and conclusion appearing on page 6 of the Intermediate Report and Recommended Order of the Trial Examiner at lines 59-60, and on page 7 at lines 1-2, reading:

“its denial of a job to Tuttle because the latter incurred Fudge’s displeasure and was therefore unable to obtain union clearance, was discriminatory and violative of Section 8 (a) (1) and (3) of the Act. It is so found.”

for the reason that said statement and conclusion is against the evidence, contrary to fact, and is not supported by a proper finding of fact.

Conclusions of Law

Exception No. 9

Respondent excepts to Conclusions of Law Nos. 2, 3, and 4 reading as follows, page 7, lines 41-54:

“2. By refusing employment to M. E. Tuttle because of his failure to obtain clearance from the aforementioned labor organization, thereby encouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.”

“3. By the said discriminatory refusal of employment to M. E. Tuttle, the Respondent interfered with, restrained and coerced its employees, and potential employees, in the exercise of rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor prac-

tices within the meaning of Section 8 (a) (1) of the Act."

"4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act."

for each and all of the following reasons:

(1) Said Conclusions of Law are not supported by and are contrary to any proper Finding of Fact.

(2) Said Conclusions of Law are based upon and supported only by erroneous Findings of Fact which are not in accordance with and unsupported by the evidence in record.

(3) Said Conclusions of Law are erroneous in that:

(a) There was and is no evidence that Mr. Tuttle was offered employment by Respondent which was subsequently refused because he was unable to obtain Union clearance.

(b) There was and is no evidence that the Union gave preference in referral for employment to its own members; on the contrary, the Trial Examiner has found that a non-member was referred to fill the vacancy Tuttle sought. (Page 4, line 40.)

(c) There was and is no evidence that any act or thing done or alleged to have been done by the Respondent encouraged or was intended to encourage membership in the Union.

(4) Said Conclusions of Law fail to state a proper charge of any unfair labor practice under and within the purview of the National Labor Relations Act.

Recommendations

Exception No. 10

Respondent excepts to each and every recommendation as suggested in the Trial Examiner's Intermediate Report and Recommended Order and more specifically as referred to on page 7, lines 15-30, both inclusive and page 8, lines 3-50, both inclusive, reading as follows:

"It having been found that the Respondent refused M. E. Tuttle employment because he was unable to obtain union clearance, thereby discriminating against him, it will be recommended that Respondent offer him employment in a position substantially equivalent to that in which he would have been employed except for his failure to obtain union clearance, with such seniority and other rights and privileges as would have accrued had he not been discriminatorily denied employment, and make him whole for any loss of pay suffered because of the discrimination against him, by payment to him of a sum of money equal to what he normally would have been paid in Respondent's employ from the date when he was first discriminatorily denied employment, to the date of Respondent's offer of employment, less his net earnings during said period and any money he may already have been paid because Respondent's discrimination against him.⁴ Loss of pay shall be com-

⁴ "There was evidence to the effect that a settlement on a charge filed by Tuttle against Local 431, involving the payment of a sum of money to Tuttle by Local 431, had been effectuated prior to the hearing in this proceeding."

puted upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.”

“Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation, and B. Perini & Sons, d/b/a Kings River Constructors, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) By refusal of employment or in any like or related manner, encouraging membership in Teamsters Local 431, or any other labor organization;

(b) In any manner interfering with, restraining, or coercing employees, or applicants for employment, in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer M. E. Tuttle immediate employment in a position equivalent to that in which he would have been employed on or about February 28, 1957, except for his failure to obtain union clearance, with such seniority and other rights and privileges as would have accrued to his benefit had he been employed on or about that date, and make M. E. Tuttle whole in the manner, according to the method, and under the conditions set forth in Section V above, entitled “The remedy”;

(b) Post in conspicuous places, including places

where notices to employees are customarily posted, at its office in Fresno, California, and on the site of its Black Rock project, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region of the Board, shall, after being signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply with the foregoing recommendations.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid."

for the following reasons and upon the following grounds, among others, that:

(1) Respondent has committed no act as declared illegal by the terms and provisions of the National Labor Relations Act.

(2) No legal basis exists for the exercise of any

remedy by order of the National Labor Relations Board.

(3) Said recommendations and suggested cease and desist order are entirely without merit and unwarranted in that Respondent has committed no act as condemned or made illegal by the terms and provisions of the National Labor Relations Act.

(4) Said recommended cease and desist order is broader than that warranted by law in that the law proscribes "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization", whereas the proposed order would make any refusal of employment a violation.

(5) The suggested cease and desist order has no basis in fact from the record showing or indicating that Respondent restrained or coerced its employees or applicants for employment in the rights guaranteed in Section 7 of the Act.

(6) Said suggested cease and desist order is too broad in Section 2 (a) page 8, lines 18 to 27 inclusive for the reasons that:

(a) There is no finding or showing that Mr. Tuttle would have been employed or would have been offered employment by Kings River Constructors on or about February 28, 1957.

(b) There is no showing or evidence that a position for which Mr. Tuttle is qualified was at that time open or is at this time available.

(c) No "seniority" system is provided for or conveniently possible in the construction industry.

(d) There is no showing or evidence that Mr. Tuttle has lost wages or income as the result of any act of Respondent.

Appendix

Exception No. 11

Respondent excepts to the proposed form of notice annexed to the Trial Examiner's Intermediate Report and Recommended Order, as follows:

"We Will Not require clearance through International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, or any other labor organization, as a condition of employment or in any like or related manner discriminate in regard to hire and tenure of employment."

"We Will Not in any other manner interfere with, restrain, or coerce our employees, or applicants for employment, in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act."

for the reasons and on the grounds:

(1) That there is no legal basis upon the record

of this case and a proper interpretation of the case for the issuance of cease and desist order.

(2) That such notice is broader than warranted by the evidence and there should in all events be stricken therefrom the words "any other labor organization" for the reason that there is absolutely no basis for such reference since no other labor organization was mentioned nor is there a finding of general discrimination or general practice of union clearance.

and:

"We Will offer M. E. Tuttle employment previously denied him because of his failure to obtain clearance through the above-named labor organization, and make him whole for any loss of pay he suffered as a result of the discrimination against him."

for the reason that no opening for employment is available nor is there a finding or any evidence to support a finding that Mr. Tuttle has suffered a loss of pay as the result of the type of discrimination made unlawful under the National Labor Relations Act.

General Exceptions

Exception No. 12

Respondent excepts to each and every finding, conclusion and recommendation of the Trial Examiner as contained in the Intermediate Report and Recommended Order, and to all of them, for the reason that said findings and conclusions are contrary to the evidence and to law in so far as they

find a violation of the National Labor Relations Act, or any section thereof.

Exception No. 13

Respondent excepts to the Intermediate Report and Recommended Order on the grounds and for the reasons that the Trial Examiner failed to find and conclude on the basis of the evidence before him:

(1) No agreement, practice, understanding, or arrangement exists, or did exist, between Respondent and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local No. 431, providing for a referral or clearance system or other hiring hall or union security arrangement.

(2) "Refusal to hire" is not discrimination per se within the proscriptions of the National Labor Relations Act.

(3) Discrimination per se is not a violation of the National Labor Relations Act.

(4) The Respondent cannot be found in the anomalous position of "encouraging membership in any labor organization" by hiring a non-union man for the position the Charging Party, a union member, sought.

(5) Respondent has committed no act violative of the National Labor Relations Act.

Dated and Respectfully Submitted This 28th Day of May, 1958.

/s/ THOMAS L. SMITH,
Attorney for Respondent.

Proof of Service Attached.

United States of America

Before the National Labor Relations Board

Case No. 20-CA-1288

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION, and B. PERINI & SONS, d/b/a KINGS RIVER CONSTRUCTORS, and M. E. TUTTLE, an Individual.

DECISION AND ORDER

On May 12, 1958, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommended that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions and recommendations.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation, and B. Perini & Sons, d/b/a Kings River Constructors, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in and activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, or any other labor organization, by refusing employment to applicants unless they obtain clearance by such labor organization, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) In any other manner,¹ interfering with or restraining or coercing employees, or applicants for employment, in the exercise of the right to self-organization, to form, join or assist labor organi-

¹ Because the discriminatory refusal on the part of the Respondent to hire the Charging Party absent union clearance goes to the very heart of the Act and because we believe that the Respondent's repeating the commission of the violation involved herein in the future may be anticipated by reason of its conduct herein, we order that the Respondent cease and desist from in any manner infringing upon the rights of employees as guaranteed by the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4).

zations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer to M. E. Tuttle immediate employment in a position substantially equivalent to that in which he would have been employed on or about February 28, 1957, except for his failure to obtain clearance through the above-named labor organization, with such seniority and other rights and privileges as would have accrued to his benefit had he been employed on or about that date, and make him whole for any loss of earnings suffered as a result of the discrimination against him in accordance with the terms and subjects to the conditions described in the section of the Intermediate Report entitled "The Remedy."

(b) Post at its office in Fresno, California, and on the site of its Black Rock project, if work there is still in progress, copies of the notice attached hereto and marked "Appendix."² Copies of said

² In the event that this Order is enforced by a Court of Appeals, the notice shall be amended by substituting for the words: "A Decision and Order" the words "A Decree of a United States Court of Appeals Enforcing an Order."

notice to be furnished by the Regional Director for the Twentieth Region shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment of M. E. Tuttle under the terms of this Order;

(d) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order of the steps it has taken to comply herewith.

Dated, Washington, D. C., October 17, 1958.

PHILIP RAY RODGERS, Member,
STEPHEN S. BEAN, Member,
JOHN H. FANNING, Member,

[Seal] National Labor Relations Board.

APPENDIX

Notice to All Employees: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees and applicants for employment that:

We Will Not encourage membership in and activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 431, or any other labor organization, by refusing employment to applicants unless they obtain clearance by such labor organization, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

We Will Not in any other manner interfere with or restrain or coerce employees, or applicants for employment, in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

We Will offer to M. E. Tuttle immediate employ-

ment in a position substantially equivalent to that in which he would have been employed on or about February 28, 1957, except for his failure to obtain clearance through the above-named organization, with such seniority and other rights and privileges as would have accrued to his benefit had he been employed on or about that date, and make him whole for any loss of earnings suffered as a result of the discrimination against him.

Morrison-Knudsen, Inc., Henry J. Kaiser, Macco
Corporation, and B. Perini & Sons, d/b/a
Kings River Constructors

(Employer)

Dated.....

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals
for the Ninth Circuit

No. 16301

MORRISON-KNUDSEN, INC., HENRY J.
KAISER, MACCO CORPORATION, and B.
PERINI & SONS, d/b/a KINGS RIVER
CONSTRUCTORS, a Joint Venture,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.92, Rules and Regulations of the National Labor Relations Board—Series 7, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, known as Case No. 20-CA-1288, before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner William E. Spencer on Feb-

ruary 24, 25, 1958, together with all exhibits introduced in evidence.

(2) Copy of Trial Examiner Spencer's Intermediate Report and Recommended Order issued May 12, 1958.

(3) Petitioners'¹ exceptions to the Intermediate Report and Recommended Order received May 28, 1958.

(4) Copy of decision and order issued by the National Labor Relations Board on October 17, 1958.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 4th day of February, 1959.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

¹ Respondent before the Board.

[Endorsed]: No. 16301. United States Court of Appeals for the Ninth Circuit. Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation and B. Perini & Sons, d/b/a Kings River Constructors, Petitioners, vs. National Labor Relations Board, Respondent. And National Labor Relations Board, Petitioner, vs. Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation and B. Perini & Sons, d/b/a Kings River Constructors, Respondents. Transcript of Record. Petition to Review and Petition to Enforce Order of the National Labor Relations Board.

Filed: February 9, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16301

MORRISON-KNUDSEN, INC., HENRY J.
KAISER, and B. PERINI & SONS, d/b/a
KINGS RIVER CONSTRUCTORS, a Joint
Venture, Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and
M. E. TUTTLE, Respondents.

PETITION FOR REVIEW OF DECISION

Comes Now the above named Petitioners and, in support of this, their petition to review the Deci-

sion and Order of the National Labor Relations Board, entered and dated October 17, 1958, in case No. 20-CA-1288, and pursuant to the provisions of 29 U.S.C. Section 160 (f), respectfully show unto the above entitled Court:

I.

Nature of Proceedings

This is a petition to review the Decision and Order of the National Labor Relations Board, entered October 17, 1958, in National Labor Relations Board Case No. 20-CA-1288 (121 NLRB 179) against the above named Petitioners, a copy of which Decision and Order is attached hereto and designated Exhibit A. The said Decision and Order found that Petitioners had engaged in and were engaging in an unfair labor practice in violation of Section 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, and ordered Petitioners to cease and desist from certain conduct described therein and take certain described affirmative action. The said Decision and Order is a final order of the Board in this proceeding.

II.

Venue

The events out of which this proceeding arose all occurred at or in the general vicinity of Fresno, California. The original complaint was issued from the office of the Twentieth Region of the National Labor Relations Board located at San Francisco,

California, and the hearing before the Trial Examiner for the Board was held in Fresno, California. That the location of the construction work in which the petitioners were engaged forming the basis of jurisdiction of the National Labor Relations Act was located approximately sixty miles northeast of Fresno, California.

III.

Grounds of Relief

The Petitioners seek the relief prayed for herein on the following grounds:

1. That the factual findings and conclusion of the Board Decision, including the adopted Intermediate Report of the Trial Examiner, are not supported by substantial evidence on the record considered as a whole.
2. That the Trial Examiner committed errors of law in the conduct of the hearing which were excepted to at the time.
3. That the conclusions of law contained in the Decision of the Board, including the adopted Intermediate Report and conclusion of the Trial Examiner, are not as a matter of law supportable by the record or by the facts even as found by the Board and the Trial Examiner.
4. That the alleged conduct, even if found to violate the National Labor Relations Act, is nevertheless insufficient to support the broad scope of the Board's remedial Order.
5. That the Board's Order sets forth remedies

inappropriate to the conduct found to be in violation of the Act.

6. That the Board's Order does not state with reasonable specificity the acts which the petitioners are to do or are to refrain from doing.

IV.

Relief Prayed

The Petitioners seek relief herein as follows:

1. That the court enter a decree herein setting aside, reversing or denying enforcement to the Decision and Order of the Board in total.

2. That in the event the prayer of Section 1 of this paragraph is not granted, that the court modify the Decision and Order of the Board as follows:

(a) By striking paragraph 1 (b) from said Order.

(b) By striking paragraph 2 (a) from said Order.

(c) By striking paragraph 2 (b) from said Order.

(d) By striking paragraph 2 (c) from said Order.

3. That in the event Sections 1 and 2 (b) of this paragraph are denied, by modifying paragraph 2 (a) to strike the provision requiring the offering of reinstatement to M. E. Tuttle, and further limiting the back pay period to the period during which

the job for which Tuttle applied was available, to wit, to on or about April 12, 1957.

Dated this 24th day of December, 1958.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, and B. PERINI & SONS, d/b/a KINGS RIVER CONSTRUCTORS, a Joint Venture,

/s/ By R. B. SNOW,

An Authorized Official.

ALLEN, DeGARMO & LEEDY,

/s/ By GERALD DeGARMO,

/s/ SETH W. MORRISON,

Attorneys for Petitioners.

Duly Verified.

[Endorsed]: Filed December 29, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW OF ITS DECISION AND ORDER AND CROSS-APPLICATION FOR ENFORCEMENT OF SAID DECISION AND ORDER

The National Labor Relations Board, by its Associate General Counsel, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151 et seq., as amended by 72 Stat. 945), (hereinafter called the Act) files this Answer

to the petition for review of its decision and order issued against petitioner on October 17, 1958, and also files a Cross-Application for enforcement of said decision and order.

1. The Board admits the allegations contained in paragraphs numbered I and II of the petition for review.

2. With respect to all other allegations of the petition to review, the Board prays reference to the certified transcript of record for a full and exact statement of the proceedings before the Board, the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter before the Board.

3. The Board denies each and every allegation of error contained in the petition for review.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects proper under the Act, and pursuant to Section 10 (e) of the Act, respectfully cross-applies to this Court for enforcement of said order.

5. Pursuant to Section 10 (e) and (f) of the Act, as amended, the Board has certified and filed with the Court a list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board in Case No. 20-CA-1288.

Wherefore, the Board prays that the Court enter

a decree denying the petition to review and enforcing the Board's order in full.

Dated at Washington, D. C., this 4th day of February, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed February 9, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON PETITION FOR REVIEW

Come Now the above named petitioners, and submit the following statement of points on their Petition to Review the Decision and Order of the National Labor Relations Board in this cause, entered and dated October 17, 1958:

1. That the factual findings and conclusion of the Board Decision, including the adopted Intermediate Report of the Trial Examiner, are not supported by substantial evidence on the record considered as a whole.
2. That the Trial Examiner committed errors of law in the conduct of the hearing which were excepted to at the time.
3. That the conclusions of law contained in the Decision of the Board, including the adopted Inter-

mediate Report and conclusion of the Trial Examiner, are not as a matter of law supportable by the record or by the facts even as found by the Board and the Trial Examiner.

4. That the alleged conduct, even if found to violate the National Labor Relations Act, is nevertheless insufficient to support the broad scope of the Board's remedial Order.

5. That the Board's Order sets forth remedies inappropriate to the conduct found to be in violation of the Act.

6. That the Board's Order does not state with reasonable specificity the acts which the petitioners are to do or are to refrain from doing.

Dated this 28th day of February, 1959.

ALLEN, DeGARMO & LEEDY,
By SETH W. MORRISON, •
Attorneys for the Petitioners.

[Endorsed]: Filed March 5, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

COUNTER-STATEMENT OF POINTS ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT

The National Labor Relations Board, by its Associate General Counsel, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151 et seq., as amended by 72 Stat. 945), (hereinafter called the Act) submits the following counter-statement of points on the petition for review and cross-application for enforcement of its decision and order in this cause, issued against petitioners on October 17, 1958:

1. The factual findings and conclusions of the Board, including the adopted Intermediate Report of the Trial Examiner, are supported by substantial evidence on the record considered as a whole.
2. The Board's order is proper in all respects.

Dated at Washington, D. C., this 11th day of March, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed March 16, 1959. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-1288

In the Matter of:

MORRISON-KNUDSEN, INC., HENRY J. KAISER and B. PERINI & SONS, doing business as KINGS RIVER CONSTRUCTORS,

Respondent,

and

M. E. TUTTLE (an individual),

Charging Party.

TRANSCRIPT OF PROCEEDINGS

Council Chambers, City Hall, Fresno, California,
Monday, February 24, 1958.

Pursuant to notice, the above - entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: William E. Spencer, Trial Examiner.

Appearances: Robert M. Yeates, Attorney, of the Staff of the National Labor Relations Board, 20th Region, 856 U. S. Appraisers Building, 630 Sansome Street, San Francisco 11, California, appearing as counsel for the General Counsel; Thomas L. Smith and Lee E. Knack, Attorneys, 319 Broadway, Post Office Box 450, Boise, Idaho, appearing on behalf of Kings River Constructors, Respondent; M. E. Tuttle, the Charging Party, 957 Santa Ana Drive, Santa Rosa, California, appearing on behalf of himself. [2]*

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Proceedings

Trial Examiner Spencer: This is a hearing before the National Labor Relations Board in the matter of Morrison-Knudsen, Inc., Henry J. Kaiser and B. Perini & Sons, doing business as Kings River Constructors, and M. E. Tuttle, an individual, Case No. 20-CA-1288. The Trial Examiner appearing for the National Labor Relations Board is William E. Spencer.

Will counsel state their appearances in the following order, please:

For the General Counsel.

Mr. Yeates: Robert M. Yeates.

Trial Examiner: For the Charging Party.

Mr. Tuttle: M. E. Tuttle.

Trial Examiner: What is your address, Mr. Tuttle?

Mr. Tuttle: 957 Santa Ana Drive, Santa Rosa, California.

Trial Examiner: And for the Respondent?

Mr. Smith: Thomas L. Smith.

Trial Examiner: And Mr. Knack?

Mr. Knack: And Lee Knack.

Trial Examiner: Lee E. Knack, do you want it to appear that way, Mr. Knack?

Mr. Knack: Yes.

Trial Examiner: I take it, there are no further appearances?

(No response.) [4]

Trial Examiner: Our reporter makes the only official transcript of these proceedings and all citations must be to the official transcript. Exhibits

should be filed in duplicate. If you want to discuss issues informally, request a recess, please. If you care to file a brief with the Trial Examiner and will so indicate before we close the hearing, he will set a time within which briefs will be received. And if you wish to engage in oral argument, that will be made a part of the transcript at the close of the evidence. I believe that is about all in the way of formalities.

Will you proceed with the introduction of the papers, Mr. Yeates?

Mr. Yeates: Yes. At this time I would like to offer in evidence the formal documents, which I have tentatively marked for identification here as follows:

General Counsel's Exhibit 1-A is the original charge filed May 8th, 1957;

1-B is the affidavit of service, with the date of mailing May 9, 1957, to which is attached the Post Office receipt;

1-C is the first amended charge, filed June 7th, 1957;

1-D is the affidavit of service of the first amended charge, date of mailing June 7th, 1957, to which is attached the Post Office return receipt;

1-E is the complaint and notice of hearing, dated the 27th of December, 1957; [5]

1-F is the affidavit of service, with the date of mailing December 27th, 1957, to which is attached Post Office return receipts;

1-G is the answer to the complaint, filed January 6th, 1958.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 1-A to 1-G, respectively, for identification.)

Mr. Yeates: I will hand a copy of these documents to Respondent, and at this time I move that they be received in evidence.

Trial Examiner: Objection, Mr. Smith?

Mr. Smith: No objection.

Trial Examiner: Receive——

Mr. Smith: Mr. Yeates, may I ask, the answer appears to be a copy of the answer.

Mr. Yeates: You have a copy. The formal documents are here. I just gave you a copy for examination.

Mr. Smith: Oh.

Trial Examiner: Did you want to see the originals?

Mr. Smith: No; I suppose the copies actually conform to the originals of the formal documents. There will be no objection.

Trial Examiner: Received.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-G, respectively, for identification were received in evidence.) [6]

Mr. Yeates: At this time I would like to——

Trial Examiner (interrupting): We have no jurisdictional problem here, Mr. Yeates, do me?

Mr. Yeates: I don't think we do. I would like to make a motion in that regard and I think that will take care of it.

At this time I would like to move to amend

Paragraph II of the complaint to identify the names of the corporations engaged in the joint venture known as Kings River Constructors to conform with the answer made, so that the Paragraph II would read: "Morrison-Knudsen Company, Inc., a Delaware corporation, Henry J. Kaiser Company, a Nevada corporation, Macco Corporation, a Nevada corporation, and B. Perini & Sons, Inc., a Massachusetts corporation, are and were at all times material herein"—and then the remainder of that first paragraph would read as it was in the complaint;

Then, the last subparagraph under Paragraph II would be corrected to read: "Morrison-Knudsen Company, Inc., Henry J. Kaiser Company, Macco Corporation and B. Perini & Sons, Inc., the four companies engaged in"—and from there on it would be the same.

Trial Examiner: Is that satisfactory to you, Mr. Smith?

Mr. Smith: That is satisfactory.

Trial Examiner: Granted.

Mr. Yeates: And with that amendment, I would also move now, pursuant to Section 102.20 of the Board's Rules and Regulations, [7] that the following paragraph of the complaint be deemed to be admitted as true and so found by the Trial Examiner and the Board, for the reason that the Respondent's answer has failed to deny the application of that.

The paragraphs I refer to are Paragraph I,

Paragraph II as amended, and Paragraph III of the complaint.

Now, on the Paragraph II, I deem from Respondent's answer that in that they are admitting the volumes set out would be correct.

Mr. Smith: We are not denying it. We are within the jurisdictional yardsticks, we presume.

Mr. Yeates: Very well.

Trial Examiner: That seems to cover that, Mr. Yeates.

Mr. Yeates: Very well.

Trial Examiner: Let's see. Where is Paragraph IV of the complaint?

Mr. Yeates: Paragraph IV—on that also, Mr. Trial Examiner, at a pre-hearing discussion it was my understanding that the Respondent will stipulate that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 431, is a labor organization within the meaning of Section 2 (b) of the Act.

Trial Examiner: So stipulated?

Mr. Smith: So stipulated. One of these days we are going to ask for proof just to see how it is done. [8]

Mr. Yeates: Well, if that is the only thing we have to worry about—

Trial Examiner: I have conducted hearings where it had to be proved.

Mr. Yeates: Yes.

Trial Examiner: Proceed, Mr. Yeates.

Mr. Yeates: At this time I would like to call Mr. Tuttle.

MANFRED E. TUTTLE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yeates): Will you state your full name, Mr. Tuttle?

A. Manfred E. Tuttle. I reside at 957 Santa Ana Drive, Santa Rosa, California.

Q. What is your field of work, Mr. Tuttle?

A. Well, in the last few years I have been working in the warehouse as a warehouse clerk.

Q. For what companies have you worked?

A. Well, I worked for Morrison-Knudsen up at Lomolo and I worked for a combination of Morrison-Knudsen Company at Beardsley Dam.

Q. And approximately when was that?

A. I quit in November of—I think it was either the 12th or the 14th—of 1956.

Q. Are you a member of any union, Mr. Tuttle?

A. I am a member of the Teamsters and Warehousemen.

Q. What local? A. 439.

Q. Where is that located?

A. Fresno.—Or Stockton. Pardon me.

Q. All right, Mr. Tuttle. Did you at any time in February of '57 contact Mr. Sharp at his home?

A. Yes, I did.

Q. Do you know the approximate date?

A. I think it was Friday night I first contacted him, if I am not mistaken, Friday night. That

(Testimony of Manfred E. Tuttle.)

would be about somewheres around the 18th or 19th, somewheres around there.

Q. Was it a Friday, do you know?

A. No; maybe a little later than that.

Q. Friday night, you say?

A. Friday night, when I first contacted Mr. Sharp.

Q. And that was at his home? A. Yes.

Q. Did you have any discussion with Mr. Sharp at that time regarding employment?

Trial Examiner: Do we have Mr. Sharp identified?

Mr. Yeates: Thank you. I will identify him.

Q. (By Mr. Yeates): The person we are referring to as Mr. Sharp, would you give his name and address?

A. His name is Jack Sharp, and he lives at Friant, about [10] 20 miles out from here.

Trial Examiner: California?

The Witness: Yes.

Q. (By Mr. Yeates): Do you know where Mr. Sharp was employed at that time?

A. Yes. He was employed at the—I believe they call it the Haas Tunnel there, at the Black Rock.

Q. Those names are interchangeable, Haas Tunnel and Black Rock?

A. Yes. Some of them call it the Haas Tunnel—spelled H-a-a-s.

Trial Examiner: I don't think we know who Mr. Sharp is yet, just his name and address.

The Witness: He's sitting right here behind me.

(Testimony of Manfred E. Tuttle.)

Q. (By Mr. Yeates): You say he was employed at Black Rock project; and in what capacity was he employed there?

A. As a warehouse clerk.

Trial Examiner: Clerk?

The Witness: Yes.

Trial Examiner: Thank you, Mr. Yeates.

Mr. Yeates: Certainly.

Q. (By Mr. Yeates): And what was your discussion with Mr. Sharp?

A. Mr. Sharp told me he was being transferred to Wishon and that there would be a vacancy where he was there at Black Rock Tunnel, [11] so he said to come down with him the next day; we were to come down Saturday and see Mr. Bert Perkins. He was the boss up there.

Q. Boss up where? Would that be at Wishon or at Black Rock?

A. Well, I understood he was over the whole business, but there seems to be some question about that. He was the——

Q. Where did you go to see Mr. Perkins?

A. We went first to the office on Merced Street here and he wasn't there. They told us that he was over having a conference or something in the hotel. We went over to the hotel and we found Mr.——

Q. Who is "we"?

A. Jack Sharp and I.

Q. And Mr. Perkins is employed by whom?

A. Well, he is employed by that company, that combination of whatever companies it is now; there's three or four of them.

(Testimony of Manfred E. Tuttle.)

Q. Would it be Kings River Constructors?

A. Yes, Kings River Constructors.

Q. Do you know what his title was?

A. Project manager.

Trial Examiner: You have a date on this, haven't you, Mr. Yeates?

Mr. Yeates: Yes.

Trial Examiner: All right.

Q. (By Mr. Yeates): You went to see Mr. Perkins at the Fresno—— [12]

A. Yes, we did.

Q. What date was that?

A. I think it was the 23rd. I am not sure. But it was on a Saturday.

Q. It was a Saturday? A. Yes.

Q. Was that the Saturday immediately following your discussion with Mr. Sharp on Friday evening? A. It was the next day.

Q. And you state, to the best of your knowledge, that was February 23rd? A. Yes.

Q. Did you see Mr. Perkins there?

A. Yes, I did.

Q. Who was present other than Mr. Sharp and yourself and Mr. Perkins?

A. Well, there was one of the superintendents—I know him only as "Pinky", I can't remember his other name. I only know him as "Pinky"—he was there, and Mr. Del Billings, superintendent of the——

Q. Do you know who Mr.——

A. Superintendent of the kitchens and all of their eating places in these camps, he was super-

(Testimony of Manfred E. Tuttle.)

intendent over all of those. He was there. And Jack Sharp was there.

Q. What time of the morning was this? [13]

A. Well, it was before noon. It was after 9 and before noon. I can't tell you just the exact time of the day. Somewheres, I should imagine, around 10:00 o'clock.

Q. Did you have discussion between Mr. Perkins and yourself at that time? A. Yes.

Q. Was there any discussion between Mr. Sharp and Mr. Perkins?

A. Yes. That discussion took place first.

Q. Well, then, will you state to the Trial Examiner as best you recall what statements were made at that time and identify who made the statements?

A. Well, Mr. Sharp asked Mr. Perkins if he was going to send him up to work at Wishon on Monday and Mr. Perkins said yes. And he says, "Well, that will leave a vacancy then in my place there, won't it?" And Mr. Perkins said yes. "Well," he says, "you know Tuttle. He worked with you up on the Beardsley Dam. How about him?" And Mr. Perkins says, "Yes," said to Jack, "You tell John Atkins."

Q. And do you know who John Atkins is?

A. He was the warehouse manager at Black Rock or Haas Tunnel, or whatever you might call it. "And tell him to be up at the tunnel Monday." And he told me to go and clear with the union and get on the job for Monday.

(Testimony of Manfred E. Tuttle.)

Q. This last statement, was that made directly to you or to Mr. Sharp, about clearing with the union? [14]

A. It was made to me, because I was talking to him then.

Q. What did Mr. Perkins say to you in that regard?

A. To go and clear, to get my card cleared from the union and to be up on the job Monday.

Q. Did he identify the job?

A. Yes. Black Rock.

Q. Was there any further discussion at that time between Mr. Perkins and yourself and Mr. Sharp?

A. No. I believe that was the end of it, as far as I know; as far as I can remember, at least.

Q. From that meeting, where did you go after that?

A. Well, I had to go back and get my trailer first, you know, back to, I had my trailer at the house; and my wife was up at Stockton.

Q. Mr. Tuttle, at the time after you had talked with Mr. Perkins did you have to do any further business in Fresno before leaving?

A. Well, I went over to the office, to put my name in at the office over there.

Q. You say "office." What do you mean by "office"?

A. The company's main office here.

Q. Kings River Constructors? A. Yes.

Q. Where is that located?

(Testimony of Manfred E. Tuttle.)

A. It's on Merced Street, across from the [15] Fresno Hotel; that is all I know.

Q. Did you talk with anybody over there?

A. Yes. Mr. Perkins took me in to the office of Mr.—Mr. Wolcott's office. And Mr. Wolcott, I don't know whether he was there or whether he wasn't. But——

Q. You speak of Mr. Wolcott——

A. But his secretary was there.

Q. Do you know who Mr. Wolcott is, what his position with the company is, by title?

A. It's—I don't really know what the name is—labor relations man, anyway.

Q. All right. Mr. Perkins, you say, took you into Mr. Wolcott's office? A. Yes.

Q. What did you do at that time?

A. Well, he told the lady that was there to put my name on the list for the job up at Black Rock.

Q. Was your name put on the list?

A. I believe so, because the lady wrote it down, and I presume she did. She asked my name and my address and my telephone number.

Q. Then what did you do after—was there anything further done at the office at that time?

A. No. I had to go and get my—It was getting late and I had to go and get my trailer and I had to be back by Monday, so I had to hurry it. [16]

Q. All right.

A. So I went on back and then I went into the—got my trailer down the next morning, and I put it down and went into the union office.

(Testimony of Manfred E. Tuttle.)

Q. Where is the union office you speak of?

A. I don't know what the address of it is. I just can't—

Q. What city? A. Fresno.

Q. Fresno union office? A. Yes.

Q. What local is that?

A. 431, I believe.

Q. Was anybody with you at that time?

A. Well, there was a man who rode down with me. But he didn't go in the office with me.

Q. And state what you did when you went into the office of the union.

A. Well, this fellow that took me down identified—Al Fudge, he was sitting in the window there and it appeared he was alone.

Q. Did he identify what capacity he had with the union?

A. He was secretary of the union.

Q. Then what happened?

A. Then I went into the office and handed Mr. Fudge my card [17] and told him that I had got a job up there. And he flew off—

Q. Up there—did you identify where?

A. Up at Black Rock. And he flew off the handle and commenced to cuss and swear and said—

Q. Well, now, without—state what he said. Do you recall what he said to you, Mr. Tuttle?

A. "Well," he says, "we have got more god-damned warehousemen around here now than we can do anything with, and I wish that company would get their sons-of-bitches and their men all

(Testimony of Manfred E. Tuttle.)

out of here and get the hell out of the country.”
That is what he said.

Q. Did he make any statement to you in reference to your clearance?

A. He said no, he said, “No, I won’t clear you for that job.”

Q. Was there any further discussion at that time?

A. Well, I couldn’t see much use of making any more discussions with him. So I went down and I got in my—a friend of mine drove me up in his car to the warehouse at Black Rock.

Q. Now, Mr. Tuttle, before you left Mr. Fudge had you identified the job you were seeking with him?

A. Yes.

Q. And in connection with that job what was your, or what were your, statements to Mr. Fudge?

A. I told him that I had a job, that they had offered me a job up there, that Mr. Perkins had told me to come and get on the job by Monday. [18]

Q. Very well. And then, you say, after he had declined to give you clearance you left?

A. That is right.

Q. Where did you go then?

A. Well, we went out to——

Q. When you say “we,” who was that?

A. This Mr. Tracy, I believe is his name. I believe I gave you his name as “Kelly,” but his name is Tracy. He’s Irish, commonly known as “Irish” on the job, but his name is Tracy. And we drove up to the job.

(Testimony of Manfred E. Tuttle.)

Q. And what job was this?

A. At Black Rock, or Haas Tunnel. And I went in the office and I saw Mr. Sharp. And Leon happened to be there that morning.

Q. Who is Leon?

A. Well, he's the gentleman sitting right in the back——

Q. What is his last name? Do you know?

A. Leon——

Q. Would that be Leon Maples?

A. Leon Maples, that is it. I know the man well, but I can't remember his last name.

Q. What is his position with the company, if you know? A. Mr.——?

Q. At that time. [19]

A. Leon Maples?

Q. Yes.

A. He was a warehouse clerk; I believe he was on the swing shift at that time.

Q. Was he in a capacity similar to that of Mr. Sharp? A. I beg pardon?

Q. Was he in a capacity similar to that of Mr. Sharp? A. Yes, sir.

Q. When you went into the office, state what you did after that.

A. Well, I went in the office and talked to Jack for awhile and——

Q. That is Jack Sharp?

A. Jack Sharp. And he introduced me to Mr. Maples, Leon, and I had never met him before, and he said that John Atkins was busy on the

(Testimony of Manfred E. Tuttle.)

phone, and he says, "As soon as he gets through talking on the phone I will go in and you can talk to him." As soon as he got through, why, Jack took me to the door and I went in and talked to Mr. Atkins alone.

Q. Now, state what conversation was had with Mr. Atkins and identify who made the statements.

A. Well, Mr. Atkins——

Q. Mr. Tuttle, it probably would be better if you kept your hand away from your mouth.

A. I'm losin' my teeth. Mr. Atkins told me that there must [20] be some mistake. He said, "We talked about you here before this, but," he said, "Mr. Wolcott has got someone coming from Santa Ana"—or Santa Anita or some place—"for this job," he says. "Have you got your name in the office?" And I told him yes, my name had been in the office, was in the office already.

Q. Did he identify who the gentleman was who was coming to fill the vacancy?

A. No, he didn't identify the man who was coming in the vacancy. But I understand that the man——

Q. Well, never mind that, Mr. Tuttle. Then was there any further discussion with Mr. Atkins?

A. "Well," he says, "you had better go up and see Mr. Wolcott. He is up at the office." You know, their main office is some distance from the warehouse. And he said, "You had better go up there and see Mr. Wolcott." So I went up and I—we had to wait quite awhile, and finally somebody

(Testimony of Manfred E. Tuttle.)

identified his car for me and I just waited outside until he came out and I talked to him out in the, as he was getting into his car. And he said, "Well," he says, "I have already called a man for that job." And I asked, I told him that Mr. Perkins had told him to go up there. And he said, "Well, I have called a man for that job."

Q. All right. Then what happened?

A. When I asked him, he says, "Well, Mr. Perkins has no right [21] to put a man on this job anyway." He says, "He is just over at Wishon." So I said to him, "Well, it seems rather strange to me that a man can take a man off of a job but can't put another one in his place. He must have some authority here."

Q. Was there any further conversation?

A. No. He says, Mr. Wolcott said, "Well, that is the way it is. He is just over Wishon." And from then on, well, I just left.

Q. Where did you go then, Mr. Tuttle?

A. I came back to Wishon—to, from Wishon, or to Fresno, and then I drove over to Friant where my trailer was.

Q. After you had seen Mr. Wolcott did you have any further contact with Mr. Fudge?

A. Yes, I did.

Q. Where was this that you saw Mr. Fudge?

A. At his own home.

Q. And what date, if you recall?

A. No, I don't recall the exact date. But it was

(Testimony of Manfred E. Tuttle.)

—I think it was the next—I believe the next Friday night.

Q. The next Friday?

A. The Friday after—

Q. Following the date you went up to the Black Rock project?

A. Yes, sir.

Q. And where is the home of Mr. Fudge; do you know?

A. It's in Fresno; but I don't remember the street. [22]

Q. What time was it you went to see Mr. Fudge?

A. Oh, it was about 8:30, 8 or 8:30 in the evening.

Q. Did anybody accompany you?

A. No, not in the house.

Q. All right, did you see Mr. Fudge at that time?

A. Yes. I went in and he was raring to go. And he even told me he didn't want me to ever come back to his house again. And I assured him that I never would, and that I wouldn't come in even to carry him out if he was dead.

Q. What purpose did you have in going to see Mr. Fudge?

A. I went to him, to see him, about the man he put on the job up there. I understood that he never had belonged to the union, that he took out a permit or joined here, that he didn't carry no former warehouseman's card, and that he had put him on in preference to me. And I just—

Q. Well, other than the conversation you have

(Testimony of Manfred E. Tuttle.)

related to the Trial Examiner, was there any further discussion at that time?

A. Beg pardon?

Q. Was there any further discussion with Mr. Fudge at that time?

A. No, there was no further discussion. We were both rather angry and I left.

Trial Examiner: I don't really think we have just exactly what Mr. Fudge said.

Mr. Yeates: Very well. [23]

Q. (By Mr. Yeates): For the Trial Examiner, if you can recall the words that were used by Mr. Fudge—first, Mr. Tuttle, it probably would be better if you identified what you said to begin with and then what Mr. Fudge replied.

A. Well, first I told him that I was up on the job—which always makes a business agent mad—

Trial Examiner: Just tell us what was said now. Don't put in what you thought about it, Mr. Tuttle, but just what was said, will you?

A. (Continuing): I said to him I was up on the job and I understood they put a man there who was a bartender before he come here. And he said, "You leave my goddamned business alone and I will take care of it. And if you have got any damned thing to say to me at all, you say it down to the office. Don't you come to my home again. And I assured him that sure never would do it.

Q. Now, was there any further discussion or conversation?

A. That is the only conversation I ever had

(Testimony of Manfred E. Tuttle.)

with Mr. Fudge and it's the last I ever want to have with him.

Q. Well, on your answers, Mr. Tuttle, it would be better if you would just respond to what has been asked.

A. Yes, sir.

Q. Following, then, your conversation with Mr. Fudge, was there any further contact with you concerning work at the Black Rock project? [24]

A. Yes.

Q. Will you tell in what form that was?

A. Well, they told me that there was a man going to quit. I knew that, who was going to leave then.

Q. Do you know who told you that, Mr. Tuttle?

A. No, I don't. To tell you the truth, it was someone working on the job anyway, that this party had told him that they were going to leave and that there would be a vacancy there. So some—I had my mail after I had left Mr. Beck, now, I had my mail forwarded to me in care of this Black Rock, this construction company, and my mail had gone up to Black Rock, you see, and a letter come to me, wrote in ink on it was: "Get in touch with John Atkins."

Q. Where was this written?

A. It was written on the outside of the envelope in red ink. And I don't know who wrote it.

Q. You don't know the identity of the party writing that message?

A. No, I don't. It was a letter, the letter was from a friend of ours that we knew, but the letter

(Testimony of Manfred E. Tuttle.)

—this was just wrote on the outside of my letter as it was returned to me here at Fresno, you see.

Q. Do you have that envelope on which that was written now, Mr. Tuttle?

A. No, I haven't. I never thought it was important and I didn't keep it. [25]

Q. Very well. Then what did the message say, as best you can recall?

A. To call up John Atkins at the Haas Tunnel job. And I tried to call him on the phone and I couldn't, so I drove up.

Q. Did anybody accompany you?

A. Yes. My wife accompanied me this time.

Q. And you drove up to the Haas Tunnel?

A. Yes.

Q. Black Rock project? A. Yes, sir.

Q. All right, what did you do upon arriving at the Black Rock project?

A. I went to the warehouse and talked to Mr. Atkins.

Q. What date was this, as best you recall?

A. Well, it was the first part of March. I think it was about the 6th or 7th. I wouldn't know exactly, but it was right around there.

Q. Do you know what day it was, what day of the week it was?

A. I am sorry, I don't remember the date—or the day.

Q. When was it in reference to this time that you got this message on the letter?

A. Same day. I drove up the same day.

(Testimony of Manfred E. Tuttle.)

Q. The same day? A. Same day. [26]

Q. Do you know what time it was that you got your mail?

A. I got my mail about 9 o'clock. I had a box at Friant at that time.

Q. And then, you state, you went into the warehouse and talked to Mr. Atkins? A. Yes, sir.

Q. Was anybody else present during this conversation? A. Leon Maples was there.

Q. Leon Maples? A. Yes.

Q. Yourself, Mr. Atkins, and was there anybody else present?

A. There were other men coming and going, you know, like they are, but I don't think any of them heard any of the conversation.

Q. All right. Identifying who made the statements, will you state what your conversation was with Mr. Atkins?

A. I asked Mr. Atkins if he had called me and he said he had. He said, "I called you by name and Al Fudge said that you wasn't available for any job up on this, on any of these jobs up here."

Q. Did you make any reply to that?

A. Well, there wasn't much I could say. I couldn't force the man to hire me.

Q. Did he make any other, any further, statements, other than the fact that he called for you by name and Mr. Fudge said [27] you weren't available?

A. He said he had called for me by name and

(Testimony of Manfred E. Tuttle.)

Mr. Fudge had told him that I was not available for any job up there.

Q. Was there any further discussion with Mr. Atkins? A. No.

Q. With Mr. Atkins, no further discussion?

A. We talked, yes.

Q. But anything about, in relation to, your work there?

A. Not in relation to this case, no, not in relation to that.

Q. During this conversation, do you know where Mr. Maples was?

A. Well, Mr. Maples was right there in the work office.

Q. Where would that be in relation to where you and Mr. Atkins were talking?

A. Not very far away. Practically against us. Sometimes he was right up against us.

Q. Was he there during this, during all of this conversation? A. Yes, I believe he was.

Q. Following your conversation with Mr. Atkins did you speak with anybody else up at the project?

A. At the moment, right at the moment, I don't recall at that time.

Q. And where did you go following your conversation with Mr. Atkins?

A. I came back down to Friant, where we had our trailer.

Q. Following that appearance, did you make any further contacts [28] with the Kings River Constructors?

(Testimony of Manfred E. Tuttle.)

A. Oh, yes. I was in the office several times. And Mr. Perkins told me that he would have something for me pretty quick. But they never did. And I kept going back there off and on, sometimes three or four times when Mr. Wolcott was there, and several times when he wasn't there I went in his office and talked to the——

Q. Which office? Is this the one in Fresno?

A. This is the one in Fresno. I went into his office, the one on Merced Street down here.

Q. Did you have any further conversations, if any, with Mr. Wolcott? A. Yes.

Q. When was that; do you recall?

A. Well, it was sometime later. Someone else had, some other warehouse clerk had, quit. I don't know who it was. I believe——

Q. Well, what you believe is not——

A. No, I don't know. Anyway, Mr. Wolcott called me over the two-way radio.

Q. Where were you at this time?

A. I was living out on Shaw Avenue. I had moved my trailer down to this trailer court on Shaw Avenue. And he called me there. I had left my telephone number there. And he called me there and said to keep in touch with him, that there would probably be an opening there, there would be an opening if, [29] when this new superintendent come in, they would keep the three shifts, like they had, on.

Q. What date was this?

A. That would be about the 15th, or something

(Testimony of Manfred E. Tuttle.)

like that, of April, around the middle of April anyway, the 15th or maybe a little later, I don't know.

Q. Was this before or after you had filed a charge with the National Labor Relations Board?

A. This was before.

Q. And what was his statement to you at that time?

A. Well, he told me—when I called him I couldn't get in touch with them, they have to call me from my trailer into the main office there to talk, and when I'd got there they had lost contact with him; but I called him the next day at the office down here and he told me if they kept on the swing shift and the graveyard shift there would be a job for me there. And I called up again a day or two after that, I didn't go to the office, I called him on the phone at his office, and he said that the new project manager, the new superintendent there, had decided to do away with both the swing and the graveyard shift.

Q. And this conversation was sometime around April 15th or shortly afterwards?

A. Yes, that is right.

Q. All right, was there any further discussion [30] with Mr. Wolcott or anybody else for the Kings River Constructors? A. No.

Q. Concerning your employment?

A. No. I never went—after that I never even went to the office again because I knew there was no use.

Mr. Yeates: I have no further questions.

(Testimony of Manfred E. Tuttle.)

Trial Examiner: Mr. Smith?

Mr. Smith: May we have a short recess?

Trial Examiner: Certainly. Ten minutes?

Mr. Smith: That would be fine.

Trial Examiner: We will have a ten-minute recess.

(Short recess.)

Trial Examiner: All right, Mr. Tuttle, back to the witness stand. You may cross examine, Mr. Smith.

Cross Examination

Q. (By Mr. Smith): Mr. Tuttle, when Mr. Yeates asked you your name and your work history and so on, I don't believe you stated your age. Would you mind stating your age for the record?

A. I was born in 1887.

Q. That would make you how old?

A. That would make me 70.

Q. What was your birthdate?

A. August 25th.

Q. August 25th, 1887?

A. 1887. I was born in Nebraska, if you want to know that. [31]

Q. You stated that you had worked during the last several years as a warehouseman?

A. Since 1953.

Q. Since 1953? A. Yes, sir.

Q. And what had you done previously?

A. Well, I am a mason by trade.

Q. You are a mason?

(Testimony of Manfred E. Tuttle.)

A. Yes. But I have worked at everything. I have run a business of my own, I have run a hotel, hardware store. I have done a little of everything for myself.

Q. What do you call home? Where have you done most of this, your life's work?

A. Seattle.

Q. Seattle? A. Yes.

Q. Seattle is your original home?

A. Yes.

Q. When did you first go to work as a warehouseman?

A. I went to work for Morrison-Knudsen on the Lomolo Dam, at Lomolo, Oregon.

Q. Were you at that time a member of any union?

A. Yes. I joined the union right there at Medford.

Q. At Medford? A. Yes. [32]

Q. What union?

A. The Teamsters, warehousemen's branch.

Q. Do you recall the local number of that union?

A. No, I don't. To tell you the truth, I can't give you the number. But I have got it all on my receipts at home. I transferred to 439 when I came here, so they would have it here.

Q. When did you transfer to 439?

A. When I went on the Beardsley job.

Q. Beardsley? A. Yes.

Q. And where is that?

(Testimony of Manfred E. Tuttle.)

A. That's about, I should say, 35 or 40 miles from Sonora.

Q. Sonora, California?

A. Yes, by a little town called Strawberry, if you know where that is.

Q. Now, that was the local union that had jurisdiction of that area, around Sonora?

A. Yes.

Q. The Fresno local, so to speak?

A. Well, they had an office at Jimtown out there, you know, they had a local office at Jimtown; but all of our dues and everything went in to 439.

Q. 439, you say?

A. Yes, in Stockton.

Q. Yes? [33]

A. It all went in to Stockton, yes.

Q. The number is 439?

A. Yes, in Stockton.

Q. Well, where were you living at the time that you applied for work at the Lomolo project?

A. Where was I living at the time?

Q. Yes. A. Down at Sonora.

Q. At Sonora?

A. Yes. I had just been a short time. I came to Sonora along about a month before I went to work upon that job up there.

Q. I am talking about the Lomolo project in Oregon.

A. Oh, where was I living then?

Q. Yes. A. Portland.

Q. Portland? A. Yes.

(Testimony of Manfred E. Tuttle.)

Q. And you had lived there for sometime, is that correct?

A. Well, I had really lived over in Redmond, of course; I had a business over in Redmond at that time.

Q. And who did you see about finding the job at Lomolo?

A. I went to work out there just at anything I could get.

Mr. Yeates: Mr. Trial Examiner, I believe I shall have to object to this. I think it is immaterial. [34]

Trial Examiner: Well, it is going back pretty far, isn't it, counsel?

Mr. Smith: I submit, it is going back pretty far, but the counsel for General Counsel inquired as to his previous work history on direct.

Trial Examiner: That is so. It is just a question of how much time you want to spend. Do you have some particular objective in mind?

Mr. Smith: We have some particular objective, yes.

Trial Examiner: All right, he may answer.

Q. (By Mr. Smith): You say you were looking for work generally at that time? A. Yes.

Q. Did someone with whom you were acquainted advise you of a job at Lomolo?

A. I am personally acquainted with some people by the name of Peebles and he happened to be a business agent for the Laborers at Medford, Ore-

(Testimony of Manfred E. Tuttle.)

gon, and he told me there was a—I was well acquainted with the family before they came to——

Q. Well——

A. In fact, this family were old friends of mine.

Trial Examiner: He was a business agent for what?

The Witness: He was business agent for the Laborers, Laborers Union at Medford. And he told me about this job up there. He said to go up and take anything I could get, that [35] “You can probably get something better later, but go up and get a job as a laborer.” So I went up and got a job as a laborer.

Q. (By Mr. Smith): Where did you first go in finding this job at Lomolo? Did you report at the office in Klamath Falls or Medford?

A. The union gave me a card and I went right out to the office at Lomolo. They had an office, they were just setting an office up at Lomolo.

Q. At Lomolo?

A. Yes. They was just transferring at Clearwater.

Q. And you went to work as a warehouseman?

A. Not the first couple of weeks. I worked as a laborer.

Q. For the Laborers? With the Laborers?

A. Yes.

Q. As a common laborer?

A. As a common laborer; just any old thing. And then they sent me on a truck to pick up ware-

(Testimony of Manfred E. Tuttle.)

house stuff, you see, up at—we were moving from Clearwater down to Lomolo and I helped transfer all of that stuff down. And when I got down there, why, Bartlett asked me to stay in that warehouse with him.

Q. I see. You worked for Mr. Bartlett there?

A. Yes.

Q. He was warehouse manager?

A. Yes. [36]

Q. And when you were working in the warehouse at Lomolo, was that the first time that you met Mr. Sharp?

A. Yes. That was the first time.

Q. You had never known Mr. Sharp before?

A. Never saw him in my life.

Q. And how long had you worked at Lomolo?

A. Eighteen months.

Q. Eighteen months. During that period of 18 months how many warehousemen were in the warehouse, approximately?

A. I don't know. They were—there were several that came and went.

Q. Was Mr. Sharp with you there most all of these 18 months?

A. No, he wasn't. He was only there a very short time.

Q. Only a very short time there? A. Yes.

Q. Had you ever known Mr. Atkins?

A. No. I believe I talked to him once over the telephone, you know, that radio—two-way radio business—when he was in the warehouse at Kla-

(Testimony of Manfred E. Tuttle.)

math Falls, I believe I talked to him once. And then I dropped in to his office, I think it was in '54, and talked to him just a few minutes. I don't know whether he even remembers it or not. But I do. I talked to him there. I wasn't at all acquainted with Mr. Atkins.

Q. When was the next time, to your memory, that you saw Mr. Atkins? [37]

A. When I met him up here at Black Rock.

Q. You recognized him from your previous——?

A. I couldn't help but recognize him, Atkins—six feet and something tall and a big neck.

Q. Yes. What was the reason for your termination, if you recall?

A. From Beardsley?

Q. From Lomolo?

A. That is the winter they didn't clear the roads and they stopped everything. They just kept a few of the old bosses around there.

Q. General layoff for winter?

A. Yes, layoff for the winter.

Q. Then where did you go?

A. Well——

Mr. Yeates: Mr. Trial Examiner, I again am going to object to this. I think it is outside the purview of the scope of the cross and I think it is still irrelevant and immaterial.

Trial Examiner: I guess if he wants to trace his employment history, as long as it is associated directly with this company, it is permissible. You covered the employment history briefly, to be sure, but you did cover it.

All right, proceed.

(Testimony of Manfred E. Tuttle.)

The Witness: What was the question? [38]

Mr. Smith: I will withdraw the previous question. I don't remember it, myself.

Q. (By Mr. Smith): You after 18 months' employment at Lomolo were terminated for the general layoff for the winter? A. That is right.

Q. Then did you immediately find other employment or did you move out of the area?

A. No, I didn't.

Q. Or did you move out of the area?

A. No, I didn't. I went back up to Redmond, Redmond, Oregon. That is a small town above Bend about 15 miles. And I stayed there during the winter.

Q. Then when did you first hear about the employment at Beardsley being available?

A. Well, I think the first I heard about it was in the Construction Journal.

Q. In the Construction Journal? A. Yes.

Q. Did you contact anyone concerning employment there?

A. Yes, I did. I went down and contacted Mr. Daugherty.

Q. Mr. Who? A. Daugherty.

Q. How do you spell that name?

A. D-a-u-g-h-e-r-t-y I believe it is. I don't know. It isn't the Irish Doherty. [39]

Q. Who was Mr. Daugherty?

A. He was the master mechanic.

Q. At Beardsley?

A. Yes. He was in charge of the warehouse.

(Testimony of Manfred E. Tuttle.)

Q. They had a master mechanic in charge of the warehouse at Beardsley, is that correct?

A. Well, he was in charge at that time. There was nobody else in the warehouse.

Q. Were you acquainted with anybody who was working at the time in the warehouse at Beardsley?

A. I was acquainted with Jack Sharp.

Q. Jack Sharp was there?

A. But then he wasn't working there at that time, either, when I first—

Q. Did you get a job right then at Beardsley?

A. No. I got a job about two weeks later.

Q. I see. And at that time was Mr. Sharp working at Beardsley?

A. Yes, at that time he was.

Q. He had gotten a job in the meantime?

A. Beg pardon?

Q. He had gotten a job there in the meantime?

A. I believe they sent for him. Mr. Daugherty wired for him to come up there, I believe.

Q. And your warehouse manager— [40]

A. Was Sharp at that time.

Q. Was Sharp at that time? A. Yes.

Q. After Mr. Daugherty had hired him?

A. Yes.

Q. And was Mr. Sharp your warehouse manager at all times?

A. No. They sent Jack from that job, from Beardsley, down to Wishon and they put Bartlett, the fellow who was over me before at Lomolo as warehouseman.

(Testimony of Manfred E. Tuttle.)

Q. But Mr. Sharp didn't work for Mr. Bartlett?

A. He did for awhile, yes.

Q. I see.

A. And then he went to Wishon.

Q. To Wishon? A. Yes.

Q. How long did you work there at that time, at Beardsley?

A. Well, I worked from the 1st of July, around the 1st of July, until the 12th or 14th of November. I can't remember the date that I quit up there, but the records would show it.

Q. The 12th or the 14th of November of what year? A. 1956.

Q. 1956. And—— A. I quit.

Q. You quit at that time?

A. Yes. I quit to get my teeth fixed. I had to have all [41] my teeth out. I was in bad shape and I had to get them fixed.

Q. Do you recall a man by the name of Ryan?

A. Oh, yes, I know Mr. Ryan.

Q. At Beardsley? A. Yes.

Q. And also had Mr. Ryan worked with you previously?

A. No, not that I know of. I don't believe Mr. Ryan had ever worked with me before.

Q. Not at Klamath Falls?

A. Not to my knowledge. He had never been in the warehouse, at least, with me, and he wasn't in the warehouse at Beardsley; he was in the office.

Q. He was in the office there.

(Testimony of Manfred E. Tuttle.)

A. I don't believe I had ever met Mr. Ryan until I came there.

Q. You state that you were born in 1887, and that makes you 70 years of age at this time?

A. That is right.

Q. Had you always given that birthdate on all employment records with—

A. I think so. I am sure it's on my last one.

Q. You are sure it's on your last one?

A. I have not given my age a time or two, because some places they won't hire you.

Q. In other words, you advanced it a few years so that you [42] were not over-age, not over 65?

A. Not with Morrison-Knudsen, the last time I gave my correct age.

Q. You gave your correct age the last time. What was your reason for quitting at Beardsley?

A. At Beardsley?

Q. Yes.

A. I quit to get my teeth fixed.

Q. To get your teeth fixed?

A. I had to have my teeth all out, two new plates.

Q. As a matter of fact, Mr. Tuttle, at the time that you quit Beardsley, didn't you then advise the payroll office and your supervisor that you were retiring? A. No.

Q. You never did?

A. No, I did not. That is absolutely not true.

Q. Have you ever drawn social security benefits? A. Now I am.

(Testimony of Manfred E. Tuttle.)

Q. You are now? A. I am now.

Mr. Yeates: I am going to object to this. I think it's outside the scope of the direct. I don't think it has any bearing on his testimony here. I think it is immaterial and irrelevant.

Trial Examiner: Well, what is your social security point, [43] Mr. Smith?

Mr. Smith: Well——

Trial Examiner: Does that bear on whether he had retired or not?

Mr. Smith: Yes, it bears on whether he had retired or not. That is the reason it is listed in the company records for Mr.——

The Witness: I don't know where they got that idea.

Trial Examiner: All right, I want to give you as much leeway as seems——

Mr. Smith: In short, we would argue that he had removed himself from the labor market on or about November 12th or 14th of 1956, when he terminated.

The Witness: That is not true.

Trial Examiner: Just a minute, Mr. Tuttle.

If that is part of your defense, I will take the answer.

Mr. Yeates: I would like to have a continuing objection.

Trial Examiner: So noted.

You may answer the question.

I don't think you got an answer. Did you want an answer to that last question?

(Testimony of Manfred E. Tuttle.)

Mr. Smith: I think not.

Q. (By Mr. Smith): Mr. Tuttle, you stated that you terminated at Beardsley in November of 1956 to have your teeth looked after? [44]

A. That is right.

Q. And when you did move from the Beardsley area, or Sonora, California—were you living in Sonora at that time?

A. No. I was living in Beardsley Camp.

Q. In Beardsley Camp? A. Yes.

Q. Then did you move to——

A. I moved to Stockton.

Q. To Stockton? A. The day I quit.

Q. The day you quit? A. Yes.

Q. And you had your teeth fixed at that time?

A. That is right.

Q. Then when did you next attempt to find employment?

A. Well, just as soon as I could get through at the dentist. They had a quite a job with me.

Trial Examiner: Let's see. You quit about November the 12th or the 14th. Could you give us any idea when you next applied for employment?

The Witness: Yes. It would have been after Christmas, right after Christmas, when I started looking for jobs.

Q. (By Mr. Smith): Where did you start looking for jobs?

A. I started, I registered down there at the Employment office at Stockton and I registered down at the union hall. [45]

(Testimony of Manfred E. Tuttle.)

Q. Had you had correspondence or had you called Mr. Sharp in the meantime?

A. No, I never called Mr. Sharp.

Q. When did you come to Fresno?

A. I came down just to visit him because he was a friend of mine. I had known him, you know, up in that——

Q. When was that, that you first came down to visit him, after leaving Beardsley?

A. It was at the time I applied here for a job. I got down here, and he told me he was being transferred and that there would be a job up there where he was. So I applied for this one.

Q. And where were you living in this area at the time that you came to see Mr. Sharp? Did you stay at his home?

A. No. I was staying at Stockton at that time.

Q. At Stockton?

A. Until after I had got a promise of a job, and then I moved down here.

Q. You moved down here—you have testified that you went back and got your trailer and then came down.

A. Yes.

Q. I see. What was the date, approximately, when you came down to see Mr. Sharp, to visit him?

A. As near as I can remember, it was about the 19th, somewhere, the 19th or 20th, something like that. [46]

Q. Of February?

A. Yes. It was on Friday night, anyway.

Q. Friday night?

A. Yes.

(Testimony of Manfred E. Tuttle.)

Q. If I recall it, I think Friday night would be about the—it was February 22nd.

Mr. Knack: That is right.

Mr. Smith: The calendar will show.

Q. (By Mr. Smith): And Mr. Sharp told you; you said you were looking for work, is that correct?

A. Yes.

Q. As a warehouseman preferably?

A. Yes, preferably.

Q. It didn't matter?

A. No, I didn't care.

Q. You nodded. At 70 years of age, may I ask, are you actively seeking work as a laborer?

A. I can lift more than you can. I will bet you on it.

Q. Well, right here, I wouldn't doubt it.

A. I don't feel that a man's age has got anything to do with it.

Mr. Yeates: Let's just answer the questions, Mr. Tuttle.

Q. (By Mr. Smith): You arrived here Friday evening?

A. I arrived at Friant Friday evening, not here.

Q. That is where Mr. Sharp was living at the time? [47]

A. That is correct.

Q. I see. And the next morning, I think you have testified—a Saturday morning, is that correct?

A. That is correct.

Q. You went then with Mr. Sharp to the office of Kings River Constructors, is that correct?

A. That is correct.

(Testimony of Manfred E. Tuttle.)

Q. Mr. Sharp at that time was working for the Kings River Constructors, wasn't he?

A. That is right.

Q. Had he, to your knowledge, been working for them for a considerable time or had he been working for another contractor in this area?

A. Working there ever since he left Lomolo.

Q. He was working at where, to your knowledge?

A. At Wishon—I think he worked at Wishon first and then he was transferred to—I believe that is it. Of course, I haven't—

Q. Do you know who the contractor is at Wishon?

A. It's Morrison-Knudsen, a combination thereof.

Q. Do you know the name of that combination?

A. I believe it's Perini & Walsh, Perini and Walsh is with him.

Q. Morrison, Walsh & Perini—does that sound familiar?

A. I don't know, because I never worked in the offices, I [48] don't know exactly how many.

Q. You know where the local office is here at Kings River Construction, at Fresno?

A. Yes. On Merced Street, across from the hotel.

Q. Do you recall the signs on the office windows?

A. It says "Morrison, Walsh & Perini"—if you pronounce it that way. That is an Italian name, I believe, and I don't pronounce them very good.

Q. Was there any other name on the window?

(Testimony of Manfred E. Tuttle.)

A. Oh, I don't believe there is. "Morrison, Walsh & Perini," right on the window.

Q. Mr. Sharp wrote you that he was leaving his employment at Black Rock?

A. No; he told me he was being transferred.

Q. He told you he was being transferred?

A. Yes.

Q. At Black Rock? A. Yes.

Q. And that there would be a job available?

A. Yes.

Q. Did he tell you when this transfer was to take place?

A. That is what we went to see Mr. Perkins about.

Q. I see. On this Saturday morning?

A. Yes.

Q. You went to the office; and was Mr. Perkins at the office? [49]

A. No. Someone was in the office, and I don't recall who, and they told us they were having a sort of a conference, a few of them, over in the Fresno Hotel. We went over there and found them sitting at a little booth, drinking some coffee and talking amongst themselves.

Q. In the restaurant at the Fresno Hotel?

A. Yes; that coffee shop there.

Q. And would you tell us again who was present at that time?

A. Well, I don't know Pinky's name, but everybody knows Pinky. He is the superintendent over,

(Testimony of Manfred E. Tuttle.)

I believe over all of the cats and all that stuff, all of the dirt business, you know.

Q. Yes?

A. And then there was Mr. Del Billings, who is a supervisor or superintendent or something; anyway, he takes care of all of their mess halls and all that stuff.

Q. Yes? A. He was there.

Q. And Mr. Perkins was there?

A. And Mr. Perkins was there. And some other gentleman; I don't know him.

Q. You don't know the other gentleman?

A. That is right.

Q. And Mr. Sharp and yourself arrived?

A. We came in just as they were about ready to leave, see. [50]

Q. About ready to leave? A. Yes.

Q. Did you sit down at the booth and talk with them?

A. No, sir, we didn't. There wasn't room to sit in there at that little booth anyway; and besides they were getting up, just starting to get up when we got there.

Q. And did Mr. Sharp introduce you to Mr. Perkins and the individuals at the table?

A. Well, Mr. Sharp didn't have to introduce me to Perkins. I knew him. I worked with him a year and a half, a year and 18 months.

Q. Whereabouts? A. At Lomolo.

Q. At Lomolo?

A. Not Lomolo. Beardsley.

(Testimony of Manfred E. Tuttle.)

Q. Mr. Perkins was what? What was his office?

A. Mr. Perkins was, well, we used to call him the second in command up there. Anyway, he was under Tucker.

Q. Under Mr. Tucker?

A. Under Mr. Tucker.

Q. At Beardsley? A. Yes.

Q. What was the name of that contractor at Beardsley? A. Tri-Dam Constructors.

Q. Tri-Dam Constructors? [51]

A. That is right.

Q. Now, at the time that you met Mr. Perkins in the Fresno Hotel you were aware of the fact that he was project manager at Wishon Dam? Is that correct? A. I didn't get your question.

Q. Were you aware of the fact that Mr. Perkins was project manager at Wishon Dam?

A. I was aware that he was the project manager. I thought he was over the whole bunch up there. I didn't know any difference. I didn't know what was going up there.

Q. I see.

A. I knew that he left Beardsley for that purpose.

Q. After you had had your conversation with Mr. Perkins, which was more or less as you have said, discussed Mr. Sharp's going to work for Mr. Perkins, do you recall in that conversation any mention of Mr. Sharp's superior at Black Rock or the project manager at Black Rock?

(Testimony of Manfred E. Tuttle.)

A. Yes. He told Jack to tell Mr. Atkins that I would be on the job Monday.

Q. Well, what did he say concerning Mr. Sharp's employment, is what I—in other words, Mr. Sharp, as I understand it, talked to Mr. Perkins first about his own transfer?

A. That is right.

Q. And did Mr. Perkins relate that he had talked to somebody at Black Rock concerning Mr. Sharp's transfer or——? [52]

A. Yes. He indicated that he was just taking him out. He didn't say that he talked to anybody. He just said, "I want you up there."

Q. He didn't mention in that conversation Mr. DeLay's name?

A. No, sir, he didn't mention Mr. DeLay or no one.

Q. Had you met Mr. DeLay or heard of Mr. DeLay at the time of this conversation?

A. No. I didn't know the name, never heard it until you mentioned it.

Q. Mr. Sharp never told you that Mr. DeLay was project manager at Black Rock? A. No.

Q. Following the conversation in the cafe at the Fresno Hotel on the Saturday morning, where did you go then?

A. I went to get my trailer. It was up at Stockton.

Q. You understood that you had a job at that time, is that right?

(Testimony of Manfred E. Tuttle.)

A. Right. That is quite right. I understood I had a job. He told me to——

Q. You didn't go over to the office of Morrison, Walsh & Perini or Kings River Constructors?

A. I wouldn't be sure whether I went that same day, whether I went to the office or whether I waited until Monday morning when he came back. I couldn't say for sure because that is a long time ago. [53]

Q. Did you go to see Mr. Fudge on that same day?

A. I went to see Mr. Fudge the same day that I—that the office was open, whatever day that was. I don't believe he was open on that Saturday. I believe I went there Monday. I don't believe the union office is open on Saturday.

Q. Before you went to get your trailer or afterwards? A. It was afterwards, I think.

Q. After you went to get your trailer? You are not sure? A. That is right.

Q. You hadn't talked to Mr. Fudge then before you decided to move down to Fresno, or Friant?

A. I don't know whether I talked to him before that or whether I didn't. Now, I can't, I wouldn't want to swear to that, because that's a long time ago and I wasn't keeping track of everything.

Q. Well, it is a memory test. But you did go to Stockton that same day to get your trailer, is that correct? A. That is correct.

Q. And how long did it take you to get up to

(Testimony of Manfred E. Tuttle.)

Stockton and get your trailer and come back to Friant?

A. Well, I went up to Stockton and I got my trailer and I left there at 3 o'clock and I pulled in just about dark to Friant.

Q. On what day?

A. That would be Saturday night—or Sunday night. Sunday [54] night.

Q. Sunday night? A. Yes.

Q. You went from Fresno to Stockton Saturday and got your trailer Sunday morning and drove back, is that it?

A. That is right. I got the trailer—

Q. You got in here late Sunday night?

A. Not too late. It was about sundown.

Q. Where did you tie your trailer up at that time? A. I tied my trailer up at Friant.

Q. Where was Jack Sharp living?

A. Right in his back yard, you might say, front yard or whatever.

Q. Was he living in a trailer at the time, too?

A. No. He has a home there.

Q. He has a home there? A. Yes.

Q. And he permitted you to tie up in his back yard, or front yard?

A. Yes; he wanted me to stop there for a day or two.

Q. When did you next contact the office at Kings River Constructors?

A. I went right to the office Monday morning, and I don't know whether that's the morning that

(Testimony of Manfred E. Tuttle.)

Mr. Perkins took me in to Mr. Wolcott's office and told me to give my name to the clerk— [55] to give my name to the lady that was in there.

Q. Did Mr. Perkins meet you at the door?

A. He met me outside. He saw me standing out in the hall and come out of his office and took me in there.

Q. Come out of Mr. Wolcott's office?

A. Yes, that is right.

Q. What did Mr. Perkins say at that time?

A. He said, "Register him for the job up there."

That is what he told her.

Q. He told the girl in the office at that time?

A. That is right.

Q. Did you see Mr. Wolcott?

A. Not that morning.

Q. Not that morning?

A. I didn't see him until I got out to the job.

He was out on the job.

Q. Then, did you see Al Fudge that day?

A. Yes. That's the day I seen him, that day, and asked him about it.

Q. When did you see Al Fudge?

A. Before I went out.

Q. To the job?

A. Yes. There's one thing I forgot to explain to you. When I talked to Mr. Perkins the first time he told me, "You will [56] have a hell of a lot of trouble with Fudge, but he will come around all right. We will get him around all right. He won't want to take your card in."

(Testimony of Manfred E. Tuttle.)

Q. You were a member of Mr. Fudge's local union, weren't you?

A. No. I was a member at Stockton. I am a member at Stockton. I belong to the Stockton local.

Q. The Stockton local? A. Yes.

Q. That is a different local union than the Fresno local?

A. It's supposed to be international, but it ain't. I belong to the local at Stockton. I transferred in there from Medford, Oregon.

Q. Did you make any effort then to transfer your card?

A. Yes. They won't take it. They refused to take my card.

Q. Mr. Fudge refused then, at the time, to transfer—

A. Yes, that is right. They have refused everywhere else I have moved to take it. They refused it now at Santa Rosa, they refused it at San Rafael. I tried to put it in there. They refused to take my card in any place. The only thing they will take is my money for dues.

Q. Would you relate again your conversation with Mr. Fudge?

A. You mean when I first went in the office that day?

Q. When you first went in, yes.

A. Well, not exact words, of course. I can give you the main thing. He told me, "We have got more goddamned warehousemen [57] around here now than we can handle and I wish this goddamned com-

(Testimony of Manfred E. Tuttle.)

pany would take this men and their whole god-damned outfit and get the hell out of here." That is what he told me. And I——

Q. Did you tell him you had a job?

A. That is right.

Q. You told him that?

A. He said, "I will never put you on that job."

Q. Those were his words?

A. Those were his words. He said, "I might clear you for the Big Pool," I believe he said—I believe it is—you probably know of that job out here, that Big Pool job, what they call the Big Pool. That is all I know about it. I have heard about it. He said, "I might clear you for that." And after I was out there to his house that night he said, "I wouldn't clear you for any goddamned job."

Q. That was after you had been up to the job, when you went out to his house?

A. Yes. "I will never put you to work," he says.

Q. After talking with Mr. Fudge, then you went up, you caught a ride with somebody or took your car——?

A. Dan Tracy wanted to go up.

Q. Dan Tracy?

A. Yes. And he wanted to go up there anyway, and he knew a lot of people up there, and he said, "You get in and ride [58] with me." So I bought the gas and he took his car and we went up.

Q. And you went in to see Mr. Atkins?

A. Mr. Atkins? Yes, I went in to see Mr. Atkins. Not Mr. Perkins.

Q. Did you go directly to the warehouse to see

(Testimony of Manfred E. Tuttle.)

Mr. Atkins or did you go to the office of the company up there?

A. I went to Atkins at the warehouse first, right to the warehouse.

Q. And did you find Mr. Sharp up there at that time?

A. Yes. I found Mr. Sharp; and Mr. Leon Maples was there, too.

Q. You hadn't met Mr. Maples before?

A. No, I hadn't met him.

Q. Mr. Sharp introduced you to Mr. Maples?

A. That is right.

Q. And then Mr. Sharp took you in to see Mr. Atkins, is that right?

A. Not exactly took me in. Mr. Atkins was talking on the phone. And he says, "I will go in and talk to him, and when he gets through"—and then John called me into the office.

Q. He called you into his office? A. Yes.

Q. And you talked with him there?

A. Yes.

Q. Just the two of you? [59] A. Yes.

Q. And at that time——?

A. He says, "Somebody must be screwy, Mac"—they all call me "Mac," you know—he said, "Something must be screwy, Mac. Walcott told me that he had a man up here for this job, coming up."

Q. Mr. Atkins told you that?

A. He told me that after I came in the office. He says, "There must be something screwy."

Q. I didn't think he knew you previously. How

(Testimony of Manfred E. Tuttle.)

did he come to call you "Mac"? I didn't think he knew you previously.

A. Everybody knew me up there as "Mac," and I suppose he had gotten familiar with it through hearing the rest of the people talk about me.

Q. Had Jack Sharp talked with Mr. Atkins about you before?

A. That I wouldn't know. But I know—yes, he said, "We have talked about you." Mr. Atkins said that to me.

Q. About you? A. Yes.

Q. Sometime the week previously?

A. Yes.

Q. As a matter of fact, didn't Mr. Atkins contact you in Stockton and urge you to come down?

A. Mr. Atkins?

Q. Excuse me. Mr. Sharp. Didn't he contact you in Stockton [60] and ask you to come down and visit him? A. No, he did not.

Q. You hadn't corresponded or talked with him for awhile then previous to——

A. I had never had — Jack Sharp, I don't believe, ever wrote a letter in his life to anybody. If he did, I never got one.

Q. And you just decided to go down there and see him that Friday night, is that right?

A. Yes.

Q. But you hadn't written him in advance telling him that you would be there?

A. My wife wrote to his wife, Mrs. Sharp, and

(Testimony of Manfred E. Tuttle.)

told her we were coming down to visit for a day or two.

Q. I see. Your wives are pretty good friends?

A. That is right.

Q. You are in no way related to Mr. Sharp?

A. Related?

Q. Yes.

A. I never saw him, never heard of him, until I started taking stuff from the warehouse, moving it down to Lomolo from up at Clearwater there in Oregon.

Q. Mr. Atkins then told you in this conversation in his office on Monday that the job had already been filled, or something to that effect?

A. He told me I had better go up and see—he said, “If Perkins [61] told you to come up on this job, you had better go up and see Mr. Wolcott, he is up at the main office, see him before he gets away.”

Q. Did he tell you at that time that Mr. Perkins was not project manager at Black Rock?

A. Atkins?

Q. Atkins.

A. Atkins never told me that. Mr. Wolcott told me that.

Q. You went then directly from the warehouse to Mr. Wolcott's office?

A. Not Mr. Wolcott's office. He was in the main office up there at Black Rock.

Q. At Black Rock?

A. Yes. And at that time I couldn't get in there,

(Testimony of Manfred E. Tuttle.)

so one of the boys pointed out his car and I just parked mine right close to it and stayed until he came out. Then I talked to him.

Q. Then you met Mr. Wolcott on Monday afternoon? A. That is right.

Q. And would you relate your conversation with Mr. Wolcott?

A. Mr. Wolcott told me that they had already hired a man and he was supposed to have been here that day, I believe he said. And I told him, "Well, Mr. Perkins told me to come up and get on that job there Monday." And that was the day I was there. And he says, "Well, Mr. Perkins has nothing to do with [62] this job." And I said, I told him it was strange, I thought, that a man could take a fellow off from a job with no authority to put one on.

Q. Did he tell you what Mr. Perkins' authority was, what he did?

A. He said he was just over Wishon, that is all he did. That is what Mr. Wolcott told me.

Q. Did you tell Mr. Wolcott that you were to take Jack Sharp's place?

A. That is what I was supposed to do. That is what Mr. Perkins told me.

Trial Examiner: The question was: Did you tell Mr. Wolcott that, that you wanted to take Mr. Sharp's place? Did you tell Mr. Wolcott that?

The Witness: Yes. I told him I come up there to take Jack Sharp's place. And he said they had already called a man for the job.

Q. (By Mr. Smith): And I think you testified

(Testimony of Manfred E. Tuttle.)

on direct examination that Jack Sharp had been told by Mr. Perkins that he was to go up to Wishon that same day; is that correct?

A. That is right. I don't think he got away that day, but he was supposed to have gone that day.

Q. He was supposed to have gone that day?

A. Yes.

Q. Did Mr. Wolcott say anything about Mr. Sharp's leaving [63] Black Rock and going to Wishon?

A. Mr. Wolcott?

Q. Yes. Did he say anything to you?

A. No, I don't think so. I never talked to Mr. Wolcott about Mr. Sharp other than to tell him that I come to take his place.

Q. Did Mr. Wolcott at that time say anything about another warehouse job being open or likely to be opened in the next few weeks? Did he offer you any type of employment?

A. No. Absolutely not.

Q. What did he tell you?

A. He told me that there might be something later on.

Q. What did he tell you to do?

A. Nothing definite, but he told me to keep in touch with the office. And I done that for six weeks or so.

Q. Did he ask you for your name and address?

A. He already had it in the office. He didn't have to ask for it. I had already left it there.

Q. You hadn't seen him before, though?

A. No. But I had been in his office and Mr. Per-

(Testimony of Manfred E. Tuttle.)

kins had given him my name. His secretary had my name and address when she took me in there. He had two or three men in there with him the morning that Mr. Perkins took me in—Mr. Wolcott, I mean, did—so he just gave it to the lady, or office girl, whatever she was, stenographer there. [64]

Q. What time in the afternoon did you talk to Mr. Wolcott, approximately?

A. Well, I got back to Friant at 5 o'clock, so it must have been around 1:30, 2, maybe 2 o'clock. It could have been anyplace from 1 to 3.

Q. From 1 to 3? A. That is right.

Q. And you got back to Friant about what time?

A. About 5.

Q. About 5? A. Yes.

Q. Then you went to see Mr. Fudge?

A. That is right.

Q. At his home? A. That is right.

Q. And you told him that you had been up to the job? A. That is right. I did.

Q. And why did you go to see Mr. Fudge?

A. What?

Q. Why did you go to see Mr. Fudge?

A. Why did I?

Q. Yes.

A. To see if he would clear me, that is all, why he wouldn't clear me.

Q. Of course, you had been told that the warehouse opening [65] up there—

A. I wanted to know why they were discriminating against me, that is why.

(Testimony of Manfred E. Tuttle.)

Q. But didn't Mr. Atkins tell you that the job had already been filled when you went up there Monday morning, or Monday, to see him?

A. Yes. But there was supposed to be—he told me also that there was another job that might be coming up in a few—

Q. He said there might be one coming up?

A. Yes.

Q. And then you went back to Mr. Fudge and asked him why he was discriminating against you?

A. That is right. I know I had been, when a man came from, when they brought another man in from the outside and the people on the job told me the man didn't even belong to the union when he first come here.

Q. Do you know who that man was?

A. No, I don't.

Q. Was he working there at the time?

A. He did work there.

Q. At the time you had the conversation with Mr. Atkins?

A. No, he hadn't come in yet.

Q. But he had been requested, as you understood it?

A. Yes.

Q. And the job had already been filled? [66]

A. By him.

Q. By him?

A. Yes. He wasn't there yet, though.

Q. Then, why did you ask Mr. Fudge if he were discriminating?

A. Well, he had already told me he wasn't going

(Testimony of Manfred E. Tuttle.)

to clear me for them jobs up there. And I wanted to know the reason why, why he was taking in other men that don't belong to the union and all, and putting them on the job, and me with a paid-up card, discriminating against me.

Q. I think you testified that Mr. Atkins had done the requesting for the man, that he had requested another man and that it had already been settled, the man was coming in?

A. Mr. Atkins requested it? No, Mr. Atkins hadn't requested it.

Q. Mr. Atkins hadn't requested——?

A. He wanted a man, but not any particular one; he hadn't requested at that time.

Q. Are you sure of that?

A. I am absolutely sure.

Q. Did he tell you that?

A. He told me that Mr. Wolcott had somebody for this job. That is what he told me. So evidently he didn't know who it was.

Q. That was before you saw Mr. Wolcott?

A. That was before I saw Mr. Wolcott. [67]

Q. Then, apparently the job you had gone up there to seek had been filled already, is that right?

Mr. Yeates: I think this is getting to be argumentative, Mr. Trial Examiner. I think that he has answered this repeatedly and the record will show the answer to it. And I think any further inquiry on this line is just argumentative.

Trial Examiner: I will sustain the objection to

(Testimony of Manfred E. Tuttle.)

this question because it has already been asked and answered.

Q. (By Mr. Smith): When you went to see Mr. Fudge that evening did you ask him why he had sent this other individual up on that job instead of you?

A. That is right.

Q. Or clear it up?

A. That is right. I sure did.

Q. What did Mr. Fudge say?

A. None of my damned business. "I take care of my business. You take care of yours." Mr. Fudge was really on the prod. He was on the prod.

Q. Had anybody told you at the job that Mr. Fudge had sent this man instead of you, or refused to clear you?

A. When had anybody told me—they all knew that he had refused to clear me. Mr. Atkins did.

Q. Mr. Atkins did?

Mr. Yeates: Answer the question that he asked you.

The Witness: That is what he asked me. [68]

Trial Examiner: The question was: Did anybody at the job tell you that Mr. Fudge had refused to clear you? That is the question.

A. Yes. Mr. Atkins did.

Q. (By Mr. Smith): On that date?

A. No. A later date.

Q. But not on this Monday?

A. Not at that time.

Q. Nobody told you that Mr. Fudge had refused

(Testimony of Manfred E. Tuttle.)

to clear you for the job that already had been filled on this Monday? A. No.

Q. Nobody told you?

A. Nobody; but Mr. Fudge told me that he wouldn't clear me.

Q. But you assumed that Mr. Fudge had not filled that job that day or that the job had not requested that man for that day?

A. I don't know what you are trying to get at. I can't see any sense in it.

Q. Are you sure that it was Mr. Fudge's doing that you didn't get the job that was supposedly open on Monday, the 25th of February?

A. Yes, it was open on——

Q. That was your reason for going to see Mr. Fudge? A. Yes.

Q. And inquiring why? [69] A. Yes.

Q. After you had seen Mr. Fudge on the evening of Monday, the 25th of February, at Mr. Fudge's home—— A. I wouldn't——

Q. (Continuing): ——I presume you went back to your trailerhouse; then, when was the next time that you contacted anybody about employment at Black Rock?

A. Well, my mail was coming in care of the Kings River Constructors, and I went up to Black Rock where I was supposed to have gone to work and one letter come back to me, and whoever wrote on it I don't know, but whether it was Mr. Atkins or who it was, but he said to call and get in touch

(Testimony of Manfred E. Tuttle.)

with him, get in touch with Mr. Atkins at the Haas Tunnel, there was a job opening up there. And I went out to see him.

Q. And that was sometime in the early part of March?

A. That's right. The early part of March.

Q. Around the 7th or the 8th of March, or the 6th?

A. I believe it was the first week of March, yes.

Q. You hadn't then in the meantime gone back to Mr. Fudge. Had you gone down to the office, here in Fresno, of Kings River Constructors?

A. Yes. I never went to see Mr. Fudge again after—

Q. When did you first go down to the office in Fresno of Kings River Constructors?

A. Every day; probably every two or three days, rather. [70]

Q. When, after you had seen Mr. Fudge that day, after Monday?

A. I think it was that same week.

Q. That same week? A. I think it was.

Q. How many days after Monday, approximately?

A. I think maybe the next day I was down there at the office.

Q. Next day?

A. I believe it was next day that I went down first.

(Testimony of Manfred E. Tuttle.)

Q. Who did you see in the office—or who did you try to see? Who did you ask for?

A. Well, I saw Mr. Perkins—Mr. Perkins happened to be in the office that day, I believe.

Q. He did?

A. Yes. He come in for something, he happened to be in town and he was in there.

Q. Did you talk to Mr. Perkins?

A. I did.

Q. And where did you talk to Mr. Perkins? In his office?

A. Right in the hallway. He saw me out there and he knew me and he come out and talked to me.

Q. Would you relate the conversation you had with Mr. Perkins that day?

A. He said it might be a few days, he said, "It might be a few days, Mac, but we will get a job for you."

Q. Did you tell Mr. Perkins that you had been up to the Black [71] Rock project and they didn't have a job for you?

A. Yes, I did.

Q. Did you tell him of your conversation with Mr. Fudge the night before?

A. No, I don't believe I did. But I told him about that he had refused to—I don't believe I told him about the conversation at his home, but I told him about that he had refused to clear me.

Q. Did Mr. Perkins then say anything else or did you say anything else during that conversation?

A. I can't recall anything that would interest this hearing.

(Testimony of Manfred E. Tuttle.)

Q. Mr. Perkins said, "We will try to find you a job and it will be a matter of a few days"?

A. Yes; he said, "Don't worry. We will have a job for you, Mac." That is what he said. But I did keep worrying, and I didn't get one.

Q. After you talked to Mr. Perkins there at the office did you talk with anybody else?

A. I talked to Mr.—I don't remember whether it was the same day, whether I talked to Mr. Wolcott that day or not, but I talked to him the next day or so afterwards.

Q. Where did you talk with him?

A. In his office.

Q. Here in Fresno, in his office?

A. Yes. [72]

Q. This was after you had first seen him up there at the job, up at Black Rock?

A. That is right.

Q. Out at his car? A. Yes.

Q. Now, you are not sure that it was this—I presume Tuesday morning, after you talked to Mr. Perkins, you don't know whether it was the same day you talked to Mr. Wolcott?

A. I don't remember whether it was that day, that same day, but it was that week, anyway.

Q. That week? A. That same week.

Q. Would you relate more or less the conversation that you had with Mr. Wolcott at that time?

A. Well, he just stalled along, that is all. He just kept stalling me, that is all, if anything.

(Testimony of Manfred E. Tuttle.)

Q. He said there was just nothing available at the time?

A. He told me there was nothing available now at the time; he told me there would be, there would probably be another job opening; but finally he later on did call me about a job that might come up.

Q. Did he tell you at that time who employed the people for the projects? Or did he tell you who would contact you?

A. No, he didn't tell me who would contact me. He would, I suppose. [73]

Q. He would?

A. He would contact me if there was anything available that he knew of.

Q. Did he say that he would get ahold of you if he found anything for you?

A. Yes. My telephone number was available to him there, and my address.

Q. Then, you didn't see Mr. Wolcott again for a few days, you said, but you dropped back to the office once in awhile to make inquiries?

A. That is right.

Q. Who did you see on those occasions?

A. If Mr. Wolcott was there, I would see him. If he wasn't there, I would talk to the girl in the office. That is all I could do.

Q. I see. And what would the answer be when you talked to him at the office? A. Nothing.

(Testimony of Manfred E. Tuttle.)

Q. Nothing available at the time?

A. Nothing available, nothing. Until Mr. Wolcott finally called me over the telephone one night, I believe he said—it was a two-way—and he got me on my telephone number here and he talked to me, over the two-way.

Q. The mobile radio?

A. Yes. But by the time I got to the telephone there was [74] something developed that I couldn't get ahold of him. Anyway, I called, I knew who it was, he had left a note there, and I called him at his office.

Q. That was later, that was after you got this note on that letter?

A. That is right. A long time after that. That was a long time after that.

Mr. Smith: Mr. Examiner, Mr. Knack suggests we ask for a recess at this time for lunch because the cross examination may continue for sometime.

Trial Examiner: Well, I was going to stop you at 12:30. Do you want to stop now instead?

Do you have any objection, Mr. Yeates, to stopping now?

Mr. Yeates: I have no objection.

Trial Examiner: All right, we will come back at 2 o'clock.

(Whereupon, at 12:12 o'clock, p.m., the hearing was recessed, to be reconvened at 2:00 o'clock, p.m., of the same day.) [75]

Afternoon Session

(Whereupon, pursuant to the taking of the recess, the hearing was resumed at 2:00 o'clock, p.m.)

Trial Examiner: Proceed, Mr. Smith.

MANFRED E. TUTTLE

resumed his testimony as follows:

Cross Examination—(Continuing)

Q. (By Mr. Smith): Mr. Tuttle, have you at any time after you last talked with Mr. Atkins and then later with Mr. Wolcott, have you approached any official of Kings River Constructors or a representative of Kings River Constructors, asking that you be given a settlement for being denied employment? A. No.

Q. You had felt that you had been denied employment by Kings River Constructors, is that correct? A. Yes; I am sure of it.

Q. Had you approached Mr. Fudge or anyone at the union hall for a settlement from them?

A. Not since the time I was to his house, no.

Q. Not since that time. Did you approach an attorney to represent you for a settlement?

A. No.

Q. Would you describe the circumstances in bringing your charges to the NLRB's attention?

A. I don't know as I know just what you mean.

Q. Well, I mean some way you must have con-

(Testimony of Manfred E. Tuttle.)

tacted the NLRB or they must have contacted you.
Is that correct?

A. I contacted them. They did not contact me.

Q. Where did you contact them?

A. At their head office in San Francisco.

Q. You went to San Francisco to see them there?
A. I telephoned.

Q. I see. At anybody's suggestion?

A. No. None except my own.

Q. You felt that that was the proper office to contact for such things?

A. I knew it was the only place I could get a break.

Q. They sent an investigator to see you?

A. They did.

Q. They did. And that was sometime in May, was it?

A. Yes. I believe it was. His name was Albert Schneider.

Q. And did he present to you a form of charge?

A. Yes, he did.

Q. For you to sign?
A. Yes.

Q. He took your statement?

A. That is right, he took my statement.

Q. Have you, arising out of this hearing, or arising out of the charges, excuse me, the charges made, been offered a settlement of your claims by anyone? [77]

A. I will have to ask—

Mr. Yeates: I am going to object to this line of questioning. It is not germane at all to the hear-

(Testimony of Manfred E. Tuttle.)

ing we are concerned with. And unless he is directing the attention of the witness to matters of his own with another attorney, outside the processes of the Board, as concerned a charge filed and the handling of the matter by the General Counsel from that point on.

Mr. Smith: Mr. Tuttle answered that he had not contacted an attorney.

Q. (By Mr. Smith): You have not contacted an attorney at any time, have you, concerning your charges? A. No.

Trial Examiner: The only point that I see that would be relevant and material is whether, as provided for in the Administrative Procedures Act, whether a reasonable opportunity has been offered to the Respondent to discuss the matter of settlement.

Mr. Smith: I think that——

The Witness (interrupting): Could I explain something to you?

Trial Examiner: No. This is not addressed to you. I am addressing this to counsel.

Mr. Smith: I am seeking to ascertain whether he felt he, first, had sought to determine whether the employer or union [78] would offer him a settlement of his so-called claim.

Trial Examiner: Well, I think once he has filed a charge, once the Board has taken jurisdiction, investigated and issued a complaint, and the complaint is based on the charge, the government com-

(Testimony of Manfred E. Tuttle.)

plaint, I think this witness's various and sundry motives in that respect would not be material.

Of course, it is required that the opportunity be afforded for a settlement of the issues, whether the parties may determine to make a settlement—but I take it that you are not questioning that that opportunity has been afforded?

Mr. Smith: No; as a matter of fact, we are not questioning that. We understand that a settlement has been entered into by the union of similar charges against it.

Mr. Yeates: That is with the Board; not with the employer.

Mr. Smith: The charging party gets about \$500 from that, Mr. Tuttle understand that——

Mr. Yeates: I don't know what this discussion is. I don't think it is relevant at all. But as far as the Board knows, there has never been any offer of any type of that nature made to this gentleman on a settlement.

Mr. Smith: May I ask the question, without an answer to the previous one, may I ask this question, whether Mr. Tuttle knows that a settlement has been entered into between the Board and the union by which Mr. Tuttle will receive a [79] sum of money of approximately five hundred dollars?

Mr. Yeates: I object to this again.

Trial Examiner: Well, of course—excuse me.

Mr. Yeates: I object to that, if he is directing this to the Board procedures. Now, if something is

(Testimony of Manfred E. Tuttle.)

on the side or something like that, I have no objection to that.

Trial Examiner: I take it this question is directed to Board procedures, whether or not the agents of the General Counsel have entered into a settlement agreement with the union involved here with respect to paying this witness a sum of money. Is that what your question goes to?

Mr. Yeates: For back wages, is that what you are referring to?

Mr. Smith: Yes, for supposed back wages, yes, to make him whole.

Trial Examiner: Are you objecting to taking an answer on that? I just want to get this straight.

Mr. Yeates: I am not objecting if he is going to ask the witness if he knows whether or not a settlement has been entered into between the Board and the union whereby the union has agreed to make the witness whole for any loss of wages, if any, he encountered.

Trial Examiner: You don't object to that question?

Mr. Yeates: If it is on that basis.

Trial Examiner: That is what I understand the question to be. [80]

Mr. Yeates: I still have my basic objection. I don't think it is relevant and material.

Trial Examiner: Well, there is a little latitude there, from my point of view. I think we will take the answer, if you want it.

Mr. Smith: I would like to hear it.

(Testimony of Manfred E. Tuttle.)

Trial Examiner: Do you know of any settlement made on your behalf by the Board and the union?

The Witness: Yes, I do; but what amount of anything it is to be, not that.

Trial Examiner: You don't know what amount?

The Witness: No.

Q. (By Mr. Smith): You understand you are to be made whole in wages lost?

A. Yes, I understand that.

Q. And at the time Mr. Schneider visited you and after he took your statement did he say anything to you which would give you the expectation that you would receive a sum of money for—

A. No; Mr. Schneider is simply an investigator, as far as I am understanding.

Q. Did any other agent of the Board give you any reasons to expect—

A. No, no other reason, excepting when Mr. Yeates took it up. [81]

Q. I see. Mr. Tuttle, at any time did any representative of Kings River Constructors, who you now know to be a representative of Kings River Constructors, offer you employment and then advise you that you were denied employment because the union refused to clear you?

A. Did any of them—?

Trial Examiner: Read the question back to him. Listen to it carefully.

(Last question read.)

(Testimony of Manfred E. Tuttle.)

Trial Examiner: Do you understand that, Mr. Tuttle?

The Witness: Yes, I understand. They want to know if anybody——

Trial Examiner: Well, read him the question again.

(Last question re-read.)

Mr. Yeates: I think the question is duplicitous.

Trial Examiner: I thought it was fairly clear.

Go back and read it again before we get more on the record.

(Last question re-read.)

Trial Examiner: If you don't understand it, Mr. Tuttle, just say so.

A. Yes.

Q. (By Mr. Smith): When?

A. Mr. John Atkins called for me by name. And they told me that I was not eligible for the job up there. [82]

Q. He called you by name?

A. That is right. He told me so, himself.

Q. And stated that you were not eligible for the job?

A. That I was not eligible for a job up there.

Q. For what reason?

A. Because the union wouldn't clear me. He talked to Mr. Fudge, called——

Q. John Atkins?

A. John Atkins called him on the telephone, and he asked for me by name.

Q. While you were there?

(Testimony of Manfred E. Tuttle.)

A. No. But he told me that.

Q. In your presence?

A. No. But he told me that, and I believe him.

Q. Mr. Atkins told you that, is that right?

A. That is right.

Q. That he had called Al Fudge and asked for you by name?

A. That is right.

Q. And Al Fudge refused to clear you?

A. That is right.

Mr. Smith: That is all.

Redirect Examination

Q. (By Mr. Yeates): Mr. Tuttle, on the first contact with the union for your clearance, in reference to the Black Rock job, do you recall what day that was that you went to see Mr. Fudge? [83]

A. It was on a Monday.

Q. When was that, in reference to the time you had talked to Mr. Perkins?

A. Well, that would be the first Monday after the Saturday I talked to Mr. Perkins. That would be the day after—well, the next day would be Sunday and the next day is Monday—that is when I talked to him.

Mr. Yeates: That is all.

Trial Examiner: Do you have anything further, Mr. Smith?

Mr. Smith: No.

Trial Examiner: You are excused, Mr. Tuttle.

(Witness excused.)

Mr. Yeates: At this time, Mr. Trial Examiner, I will submit a stipulation to be entered into between the General Counsel and Respondent, the stipulation being that John Atkins, the warehouse foreman at the Black Rock project, was at all times material herein a supervisor in that position as defined by the Act and in that capacity had the authority to effectively recommend hiring and discharge, directed employees in the warehouse, and was salaried.

Trial Examiner: So stipulated?

Mr. Smith: So stipulated.

Trial Examiner: All right.

Mr. Yeates: I would like to call Mr. Sharp, please. [84]

JACK SHARP

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yeates): State your full name.

A. Jack Sharp.

Q. And that is spelled S-h-a-r-p-e?

A. S-h-a-r-p.

Q. P, no e? A. No e.

Q. Where is your residence?

A. 3971 Market Street, Friant, California.

Q. What is the field of work you are engaged in?

(Testimony of Jack Sharp.)

A. Well, right at the present time I am not engaged.

Q. What line of work have you followed?

A. Warehouse, parts, in construction.

Q. How long have you been employed in the capacity of warehouseman?

A. I guess 35 years.

Q. And are you a member of any union?

A. Yes, I am.

Q. What union?

A. I have an operating engineer's card at the present, and I have a withdrawal from the Teamsters.

Q. What local is that? [85]

A. Warehousemen or Teamsters——

Q. Teamsters?

A. (Continuing): ——431, I believe.

Q. Now, you were employed at Black Rock project in February of '57?

A. Yes, sir.

Q. There has been earlier testimony here that in February Mr. Tuttle called on you at your home.

A. Yes, sir; sometime in the latter part of February I came down from the job on a Friday night, I believe, and Mr. and Mrs. Tuttle was at my place.

Q. And that was at Friant?

A. That was at Friant.

Q. Do you recall the date?

A. Well, it has been called around the 27th, so I will go along with that.

Q. It was on a Friday, you say?

(Testimony of Jack Sharp.)

A. It was on a Friday evening.

Q. And did you accompany Mr. Tuttle to Fresno to see Mr. Perkins?

A. The following morning, on a Saturday, yes.

Q. State whether you had any conversation with Mr. Perkins at that time.

A. We did.

Q. All right, where was that? [86]

A. At the coffee shop in the Fresno Hotel.

Q. And that was the following morning you stated?

A. That was Saturday morning.

Q. Who was present?

A. Well, there was Mr. Perkins, Tuttle, myself, Del Billings, there was Max Daly, I believe, an engineer, and one other engineer, I believe, by the name of—let me see—Newton.

Q. Tell the Trial Examiner what the conversation was that you had with Mr. Perkins at that time, and identify who made the statement.

A. Well, to make it clear, I will have to go back to the evening before, Friday evening before I left.

Q. All right, I think that is probably better.

A. Mr. Perkins came into the warehouse at the Haas Tunnel where I was working and informed Mr. Atkins that he was ready to have me transferred back up to Wishon at the earliest date possible, to get someone to replace me.

Q. That is, Mr. Perkins told Mr. Atkins that?

A. That is right.

Q. What day was that?

A. That was on Friday; it must have been the

(Testimony of Jack Sharp.)

26th because the Saturday was the 27th, the Saturday following.

Q. When was it in relation to the day Mr. Tuttle appeared at your home?

A. It was the same day that Mr. Tuttle appeared at my home, [87] when I got home.

Q. The same day? A. That is right.

Q. Had you known about this transfer prior to that time?

A. I knew all winter I was supposed to go back up there, but I did not know it was to happen at that time, when it was to happen until that evening.

Q. Who informed you you were to be transferred to Wishon?

A. Well, I guess Mr. Atkins did, that afternoon.

Q. But you stated earlier you had heard that you were to be transferred—

A. Well, before I left Wishon, sometime early in December, when it snowed us out, the year before, why, that was understood between some of the superintendents there; Mr. Perkins understood it, I believe, and master mechanic Chet DuPron.

Q. That you were to be transferred to Wishon, back to Wishon? A. That is right.

Q. And then you stated that on that Friday Mr. Perkins came into the warehouse, told Mr. Atkins that you were to be transferred at that time? A. Yes, sir.

Q. All right; then you met Mr. Tuttle that evening, you say? A. Yes, sir.

(Testimony of Jack Sharp.)

Q. Do you recall what conversation you had with Mr. Tuttle?

A. Well, I can't—I can't recall. It had been almost a [88] year, I guess, since I had seen him, and him and his wife came down for a visit.

Q. Was there any discussion of your transfer to Wishon?

A. I told the folks that I was being transferred back to Wishon as soon as they could get a replacement for me; and Mac maybe suggested or I suggested to Mac, I don't know which way around it went, that he might be a good replacement for me at Black Rock.

Q. Now, what was your purpose in going to Fresno on this Saturday morning?

A. To see Bert concerning about when he wanted me up there. I understood it was at the earliest date possible, and whether Mac could replace me and make it a little earlier.

Q. When you say "up there," is that Wishon you are referring to?

A. That is right.

Q. Then, with that background, do you recall the conversation you had with Mr. Perkins at Fresno on that Saturday?

A. Well, I won't say exactly, but it is awfully close. I met Bert and asked him when he was ready for me and he said as soon as I could get replaced, I believe, at Black Rock. "Well," I said, "how about Mac being a replacement for me?" Well, he seemed to think that was all right and he asked Mac how he was set up with the union and

(Testimony of Jack Sharp.)

Mac told him he was still a member of the Teamsters Union and Bert told him to get [89] his card at the union in Fresno, get transferred—or I don't know what they call it—a traveler's card, he might have mentioned that, they do leave their mother local on a traveler's card sometimes; but anyway, to make himself right with the union in Fresno.

Q. Did he or did he not tell him to report to work?

A. I don't recall that. But he did tell him to get his card in order.

Q. Do you know whether or not he made any statement with regard to registering? A. No.

Q. Were you at Black Rock project when Mr. Tuttle came up to see Mr. Atkins? A. I was.

Q. Where were you at that time, in relation to Mr. Atkins and Mr. Tuttle?

A. Well, I was back in the main room at the warehouse; and Mac knew John Atkins before and he went into the office where John was working—that is a little office up in the corner of the main warehouse—and I was on the warehouse floor.

Q. Do you know whether or not Mr. Tuttle went directly into the office when he came to the warehouse?

A. No, he did not. He came through the main warehouse.

Q. Was that where you were?

A. That is where I was. [90]

(Testimony of Jack Sharp.)

Q. What happened after Mr. Tuttle got there, as best you can recall?

A. Well, I told him he would have to go in and see John. I believe at that time, I understood—that was the following Monday, I guess, after I had seen Bert down in Fresno—they had hired a man to replace me; but he wouldn't be there for maybe a week.

Q. Did you have any discussion with Mr. Atkins concerning Mr. Tuttle before the time Mr. Tuttle arrived at the project? A. I did.

Q. What was that conversation between you and Mr. Atkins, as best you can recall?

A. Well, it was nothing out of the ordinary, I don't think. I just told him that at the conversation Bert and Mac and me had down at the Fresno Hotel. And he informed me at that time that there was another man hired to take my place.

Q. When were you transferred to Wishon, effective when?

A. The following weekend after the 27th, the first weekend in March.

Q. Did you work at Black Rock project after that time? A. No, sir.

Q. You are a personal acquaintance of Mr. Tuttle's are you? A. Yes.

Q. How long have you known Mr. Tuttle?

A. Since 1953. [91]

Mr. Yeates: I have nothing more.

(Testimony of Jack Sharp.)

Cross Examination

Q. (By Mr. Smith): Mr. Sharp, you have been acquainted for sometime with Bert Perkins, is that correct?

A. I think I met Bert Perkins for the first time in 1952.

Q. In 1952? A. Yes.

Q. But you have worked at various times on projects in which he has been superintendent, project manager? A. Yes.

Q. Specifically at Beardsley? A. Yes.

Q. He was general superintendent at Beardsley, is that correct? A. Yes.

Q. You didn't work directly for him, you worked under the master mechanic, is that correct?

A. Yes.

Q. Even when you were for a short time warehouse manager?

A. I still had a master mechanic for a superior.

Q. As your superior. And then you served as warehouse manager only a short time there, is that correct? A. I don't think it was long.

Q. You never were warehouse manager?

A. Oh, yes. A short while. [92]

Q. Mr. Sharp, what was your understanding of Mr. Perkins' position with respect to the construction on Kings River?

A. I don't follow you.

Q. What position does Mr. Perkins, or did Mr.

(Testimony of Jack Sharp.)

Perkins, have with respect to construction in that area? A. He was project manager.

Q. Project manager of what project?

A. Morrison, Walsh & Perini.

Q. What were they constructing at that time?

A. Wishon Dam.

Q. When you worked for Kings River Constructors who were you working for? Who was your project manager?

A. My project manager, I believe, was Jack Delay.

Q. Jack DeLay. And at that time, of course, your warehouse manager was John Atkins?

A. Right.

Q. Was there any connection in your mind between Kings River Constructors and Morrison-Walsh-Perini? A. Well, yes.

Q. In what way? A. Well——

Q. If you know.

A. They are more or less sponsored by the Morrison-Knudsen Company. There was a lot of work exchanged backwards and forwards; employees, more or less the same. [93]

Q. But Mr. Perkins was not project manager at Black Rock and had no authority, that you knew of, with respect to Black Rock?

A. Well, no; there was another man at Black Rock.

Q. As a matter of fact, the two projects are some distance apart, aren't they?

A. That is right.

(Testimony of Jack Sharp.)

Q. About how far apart, would you say?

A. Oh, I would say they was 20 miles.

Q. Twenty miles apart. You state that you have been transferred from Wishon to, when Wishon was closed down for the winter, to the Black Rock project, with the understanding that you would return to Wishon?

A. That is right.

Q. Did you wait for Mr. Perkins or the Wishon management to request you to come back to work at Wishon or did you ask Mr. Perkins on various occasions?

A. Well, Mr. Perkins was there, I guess it must have been on the 26th of February, and asked John Atkins for me to be sent back up to Wishon.

Q. He came into the warehouse and talked with Atkins, is that correct?

A. That is correct.

Q. And asked Mr. Atkins to arrange for your—

A. Release. [94]

Q. Release?

A. That is correct.

Q. So you could go back to work at Wishon?

A. Yes, sir.

Q. Did you ask at any time for a change of employment? Did you ask to return to Wishon?

A. I don't believe I did. Or I knew I couldn't return until the season opened.

Q. But you were satisfied to stay at Black Rock, as far as you were concerned?

A. Well, you have got to work somewhere. It doesn't matter where. But I had been with that bunch at Wishon for a number of years, I liked to work with them, I was happy to go back.

(Testimony of Jack Sharp.)

Q. Were you seeking work of a different nature at the time?

A. Well, not exactly a different nature; but it turned out that I had to activate an Operating Engineer's card. I went to work with the Engineers for a little more money.

Q. At Wishon? A. At Wishon.

Q. Were you actually transferred from Black Rock to Wishon or were you terminated at Black Rock and hired at Wishon?

A. Well, now, that would have to be answered by Jim Wolcott. He knows more about that than I do. I know they told me when I—the following weekend, that I could go on back to Wishon, there would be a place there for me. [95]

Q. Do you remember—

A. (Interrupting): I don't believe I went through the Fresno office; I would have to get cleared by the Operating Engineers. And I didn't even do that, although I did get ahold of one of the business agents and he told me to go on up there and go to work the following Monday morning and he would take care of things.

Q. That is, go up to work at Wishon?

A. Right.

Q. And he would take care of your being—this is the Operating Engineers' business agent, is that right? A. That is right.

Q. At the time you went to work at Wishon had you been cleared through the union?

A. Yes, sir. When I first went to work at

(Testimony of Jack Sharp.)

Wishon I cleared through Local 431, I believe it is.

Q. And then again when you left Wishon and went to Black Rock were you cleared through the union? A. No, sir.

Q. As a matter of fact, Mr. Sharp, didn't you talk with John Atkins some three to four days before this Monday in question—before Monday, the 25th of February, I believe the date is—didn't you talk with John Atkins concerning Mr. Tuttle?

A. No. I didn't talk with him until after I came down that [96] Friday, after I talked with Bert Perkins—or Bert was there in the warehouse.

Q. That is the first you knew that you would be going to Wishon—

A. I didn't know whether Mac existed, even, then or not.

Q. And then that Friday Mr. Tuttle's visit was a surprise to you? A. That is right.

Q. And after you talked to Bert Perkins that Saturday morning, then the next morning when you went back to work up at the warehouse—

A. Right.

Q. You talked with Atkins about Mr. Tuttle taking your place? A. Yes, sir.

Mr. Yeates: Are you through, Mr. Smith?

Mr. Smith: Yes.

Redirect Examination

Q. (By Mr. Yeates): You stated on cross examination that other employees had been transferred from Wishon to Black Rock. Was that other em-

(Testimony of Jack Sharp.)

ployees that were employed at Wishon that were transferred from there to Black Rock project?

A. Well, yes, they were, some. Well, I couldn't say they were transferred, but they were working there, the boys that I had worked with throughout the summer, when I went down to [97] Black Rock they were working down at Black Rock.

Q. On the matter of your going back to Wishon, had they told you that they were discharging you and rehiring you for that job or did they tell you they were transferring you to Wishon?

A. That I couldn't answer without——

Q. You don't know?

A. They told me I would have to get my Engineer's card in order.

Q. Who told you you were going back to Wishon? A. Bert Perkins.

Mr. Yeates: That is all.

Trial Examiner: Anything further?

Mr. Smith: Nothing further here.

Mr. Yeates: Mr. Sharp would like to be excused from the hearing room, Mr. Examiner.

Trial Examiner: Will you desire this witness again, Mr. Smith?

Mr. Smith: I don't think so, Mr. Examiner.

Trial Examiner: You are excused, sir.

(Witness excused.)

Mr. Yeates: Mr. Maples, please.

LEON MAPLES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [98]

Direct Examination

Q. (By Mr. Yeates): State your full name, please. A. Leon Maples.

Q. Where is your residence?

A. 1323 Harvard, Fresno.

Q. What is your present employment?

A. Modern Electric.

Q. That is by a company not concerned in this matter?

A. No, sir—or yes, sir, that is right.

Q. Were you employed at the Black Rock project for Kings River Constructors?

A. Yes, sir.

Q. What was the date of your employment?

A. From near the end of the year of '56 until April the 12th, 1957.

Q. Who hired you for that job?

A. Mr. Atkins.

Q. Mr. Atkins, at the Black Rock project?

A. Yes, sir.

Q. What was your duty at the Black Rock project, your job there? A. Warehouseman.

Q. Who did you work under?

A. Mr. Atkins.

Q. Were you present at the warehouse on the date in February when Mr. Tuttle came to the project? [99] A. Yes, sir.

(Testimony of Leon Maples.)

Q. The first time? A. Yes, sir.

Q. Will you tell the Trial Examiner what you recall of that incident?

A. Well, I didn't know Mr. Tuttle, but Jack introduced me to him.

Q. That is Jack Sharp?

A. Yes, sir. Jack Sharp, Mr. Sharp, introduced me to him. And I don't remember it, but we must have talked a few minutes. And Jack Sharp knew that he was leaving Black Rock and he recommended Mr. Tuttle to Mr. Atkins. I think his words were that Mr. Tuttle was a good warehouseman and would be a good replacement for him.

Q. Mr. Sharp made that statement to Mr. Atkins? A. I believe so.

Q. Were you present when that statement was made? A. Yes, sir.

Q. When was that in relation to the time that Mr. Tuttle appeared at the job?

A. Well, that was the first time Mr. Tuttle appeared at the job.

Q. Right at that time, when he came?

A. Yes, sir.

Q. Where did Mr. Tuttle go at that time? [100]

A. Well, as I recall, Mr. Tuttle and Mr. Atkins stepped off into another part of the warehouse, either the office or the dock—I was on the main area of the warehouse floor—they stepped into either the office or out on the dock, I can't remember which, and carried on a private conversation that I didn't hear.

(Testimony of Leon Maples.)

Q. Did you see where Mr. Tuttle went after he left the warehouse?

A. I don't seem to be able to remember it.

Q. What other employees did you have working with you as warehousemen at the time, this date?

A. There was a little fellow by the name of Weatherman who was working graveyard—you are speaking around the last of February?

Q. Yes, at the time Mr. Tuttle came in.

A. Well, Jack was, Mr. Sharp was on day shift and I was on swing and this Weatherman was on graveyard. I believe that's the way it was.

Q. Were you working at the warehouse on the day in March when Mr. Tuttle came to the warehouse?

A. Yes, sir.

Q. Do you recall what date that was?

A. Well, it seemed to me like it was around the middle of March, right close to the 15th, somewhere in there, 14th, something in that vicinity. [101]

Q. And did Mr. Tuttle and Mr. Atkins have any conversation at that time that you know of?

A. Well, yes.

Q. Were you present in the warehouse on that date when Mr. Tuttle came in?

A. Yes. Yes, I was. He came up that time with a fellow by the name of "Irish"—Ben Tracy is his name. Let's see, now. Yes, he asked Mr. Atkins what happened that he didn't get the job there at Black Rock. And John, or rather Mr. Atkins, said that he put in a requisition by name for Mr. Tut-

(Testimony of Leon Maples.)

tle and the responding answer was that Mr. Tuttle was not available.

Q. Now, Mr. Atkins made that statement to—to whom did he make that statement?

A. To Mr. Tuttle. I was standing right nearby, within a couple of feet, and overheard the statement, the conversation.

Q. Was there any other conversation that you recall of by Mr. Atkins to Mr. Tuttle at that time regarding that job?

A. Well, at that time the job had been filled by this Myers, if I remember correctly.

Q. Well, now, are you speaking about the March time Mr. Tuttle was there or——

A. Yes.

Q. (Continuing): Or the February time?

A. Yes, sir. [102]

Q. Mr. Myers was working with you the second time when Mr. Tuttle came?

A. I believe so.

Q. How long did Mr. Myers continue to work there?

A. He only worked there two weeks.

Q. After the time he arrived there he worked two weeks?

A. Something in that vicinity, yes.

Q. And the conversation that you spoke of between Mr. Tuttle and Mr. Atkins, that was in the warehouse?

A. I kind of think it was in the warehouse office. Of course, this is only a distance of 15 to 20 feet. I mean the office and the warehouse are just

(Testimony of Leon Maples.)

a door between the two of them, is the only difference.

Q. Do you recall what statements Mr. Tuttle made at that time, if any?

A. Well, he told us that he had had a disagreement with Mr. Fudge and he felt sure that Mr. Fudge was responsible for him not being able to obtain a clearance.

Q. Was this statements to you and to Mr. Atkins?
A. Yes, sir.

Q. And then the statement by Mr. Atkins, again, was what?

A. "Well," he said, "I put in a requisition for you, that is all I can do. I am not the labor coordinator and I have no responsibility over what happens in town."

Q. Was there any replacement hired for Mr. Myers that you know of? [103]

A. Well, yes. Mr. Ryan was hired when Myers left.

Q. Do you know approximately when it was that Mr. Ryan came to work?

A. Well, it had to be around the 15th of March, in that area.

Q. You don't know the exact date?

A. Oh, no.

Q. What were the circumstances of your leaving the Black Rock project?

A. Well, I was getting married and by working as an hourly personnel there, there was no such thing as a vacation or taking a few days off, so it

(Testimony of Leon Maples.)

was a choice of quitting or not having those days off.

Q. Had you given them notice of your impending termination?

A. I am sure I gave them at least two months' notice.

Q. Before you left? A. Yes, sir.

Q. Your termination was as a result of your own choice, then? A. Yes.

Q. At any time after this did you ever have any conversation with Mr. Fudge concerning Mr. Tuttle?

A. Oh, Mr. Fudge came up to the warehouse one day.

Q. When was that? A. I don't know.

Q. How long after the time that Mr. Tuttle had been there? [104]

A. After Mr. Tuttle had been there, probably a week or maybe 10 days.

Trial Examiner: Was that after the first time Mr. Tuttle had been there?

The Witness: The second time after Mr. Tuttle had been there.

Q. (By Mr. Yeates): March——?

A. Yes, probably around the 7th or 8th of March; right in the first 15 days of March there.

Q. You state it was after the second time Mr. Tuttle had been there, about a week after that that Mr. Fudge came to the property? A. Yes.

Q. Tell the Trial Examiner what, if any, con-

(Testimony of Leon Maples.)

versation you had with him at that time concerning Mr. Tuttle.

A. Well, I asked Mr. Fudge why we didn't get Mr. Tuttle up there as a warehouseman and Mr. Fudge said, "Well, that boy is too young to be telling me how to run my union." I believe that is what he said, or the implication.

Q. What was your reason for asking Mr. Fudge this question? A. Well, I was——

Mr. Smith: Just a minute. Aren't we going a little far afield?

Mr. Yeates: Are you objecting?

Mr. Smith: I object to this. I think it is outside the realm of the—— [105]

Trial Examiner: All right, do you object?

Mr. Smith: Yes.

Trial Examiner: Sustained. We won't go into his reasons. We will take anything he said, though, to Mr. Fudge.

Mr. Yeates: All right.

Q. (By Mr. Yeates): Can you recall the question you asked Mr. Fudge at that time concerning Mr. Tuttle?

A. I believe the only question I asked Mr. Fudge was the one that I just gave you a minute ago.

Q. That was the only one? A. Yes, sir.

Q. All right. And did Mr. Fudge make any reply then other than that which you have already given to us?

A. Not on this subject that is involved.

(Testimony of Leon Maples.)

Q. Were you ever informed from the company that there was to be an elimination of a shift at the Black Rock project?

A. Oh, I quit on the 12th and the 13th the elimination of two men or two shifts, which would be the swing and the graveyard, was to develop—well, I think we found out about it maybe Thursday or Friday. It wasn't enough notice that you could say it was a notice.

Q. When was this notice in relation to the date you terminated?

A. It was the day after I terminated.

Q. The day after you terminated? [106]

A. Yes, sir.

Q. Had there been any prior knowledge or information to that regard that you know of, of a shift elimination?

A. No, sir. No, sir.

Mr. Yeates: That is all.

Cross Examination

Q. (By Mr. Smith): Mr. Maples, at the time Mr. Tuttle first came to the Black Rock project, it was in the latter part of February, we have established, I believe, on Monday, February the 25th; what time in the afternoon, or morning, was that, as you recall?

A. Well, I was trying to figure out awhile ago what I was doing in the warehouse at that time, and I believe it was around 3 o'clock. I generally

(Testimony of Leon Maples.)

showed up early to relieve Mr. Sharp. I was on swing shift, which changed at 4 o'clock.

Q. At 4 o'clock?

A. Yes. So I would just guess and say that it was about 3 o'clock.

Q. At that time you were not working at the warehouse? A. No.

Q. You were just standing there, is that correct? A. More or less, yes, sir.

Q. And, as you recall, Mr. Tuttle came first to see Mr. Sharp? A. Yes.

Q. Did you see him come into the building?

A. Yes, I believe I did. [107]

Q. And then did he go directly to Mr. Sharp? Do you recall?

A. It's kind of a difficult question, it is kind of difficult to answer that question. There at the warehouse there's a counter separating the dock or the entrance of the warehouse from the interior of the warehouse and, unless I am mistaken, Jack and I were standing at the counter of the warehouse, and I believe Mr. Tuttle walked up to the counter from the outside of the dock.

Q. And Mr. Sharp introduced you to Mr. Tuttle? A. Yes, sir.

Q. Where was Mr. Atkins at this time?

A. Well, I believe he was in the office. That would be to the north, say, 20 or 30 feet.

Q. Did Mr. Atkins come out to meet Mr. Tuttle?

A. I think so.

(Testimony of Leon Maples.)

Q. Or did Mr. Sharp go in to Mr. Atkins' office and ask him to come out?

A. No; I think that Mr. Atkins came out into the interior of the warehouse.

Q. I see. And then I believe you stated that Mr. Atkins and Mr. Tuttle went off to the corner and had a conversation; is that correct?

A. Mr. Sharp introduced Mr. Tuttle to Mr. Atkins, and the only thing I heard in that conversation was Jack's recommendation of [108] Mr. Tuttle to Mr. Atkins.

Q. And that is all you heard?

A. To my memory, yes.

Q. That is, Jack Sharp recommended Tuttle as a replacement for him to Mr. Atkins?

A. Yes.

Q. Did you know at this time that Jack Sharp was terminating at Black Rock?

A. Yes.

Q. And going to Wishon?

A. Yes.

Q. Had he mentioned it previously to you?

A. Well, I can't answer that question. My memory is not that good. Jack, I am sure, told me about the fact that he was going to Wishon just as soon as he found it out.

Q. Did you see Mr. Perkins the previous Saturday?

A. Me?

Q. Yes.

A. No.

Q. You didn't see Mr. Perkins come into the warehouse and talk to Mr. Atkins?

A. Well, I don't remember it.

Q. To your knowledge, when Mr. Atkins and

(Testimony of Leon Maples.)

Mr. Sharp went off to talk, did you have any duties in the warehouse or were you attending to any work at all at that time? [109]

A. Well, your statement there was when Mr. Atkins and Mr. Sharp went off. I don't recall—

Q. Excuse me. Mr. Atkins and Mr. Tuttle, when they talked privately together.

A. Well, I don't know if I had any duties to perform at that time or not. But I most likely felt that it wasn't any of my business.

Q. I see.

A. So I made myself scarce.

Q. Then, on the 8th, on or about the first week in March or the middle of March, that is the only other time that you saw Mr. Tuttle, is that correct?

Mr. Yeates: Is that up to that time, you are saying?

Mr. Smith: Up to that time.

Q. (By Mr. Smith): Did you see Mr. Tuttle after you first met him?

A. Yes. Yes. He came back to the warehouse there on one occasion.

Q. On one occasion? A. Yes, sir.

Q. But you didn't talk to him on that occasion?

A. Oh, I might have conversed with him just a short while.

Q. To say hello or something of that nature?

A. Yes.

Q. I see. Other than that, other than the first time, then, [110] you never talked with Mr. At-

(Testimony of Leon Maples.)

kins or with Mr. Sharp regarding Mr. Tuttle? Or did you?

The Witness: Well, reword your question, please.

Mr. Smith: I will ask the reporter to read it back.

(Last question read.)

A. I don't remember talking with Mr. Sharp about Mr. Tuttle at all. I remember, after Mr. Myers had come to work, that I talked to John—Mr. Atkins—and told him that I wished we had been able to get Tuttle rather than this Myers.

Q. You didn't like Myers?

A. I didn't like—well, yes, that is the statement, yes.

Q. But you didn't know Tuttle really? You didn't know whether—

A. No, sir. I had no idea about him.

Q. What did you have against Mr. Myers?

A. This was nothing personal at all. He just, he was not interested in his work, he preferred to goof off rather than do the work that was left out for him at night, which would result in my doing it the next day.

Q. In other words, you were working different shifts?

A. No, sir. He was working the swing shift, I was working the daylight shift, and I would leave work for him to do that afternoon and that night, and the next morning I would have to come back and do it by myself, do it myself.

(Testimony of Leon Maples.)

Q. It wasn't a matter of personal clashes between you? [111]

A. No, sir. Not at all.

Q. You stated that you talked with Mr. Fudge about Mr. Tuttle.

A. Yes, sir.

Q. And just to refresh my memory, would you tell me again what you said to Mr. Fudge and what Mr. Fudge said to you?

A. Well, I just asked Mr. Fudge why we got—why Mr. Tuttle wasn't sent up, and he said, in a joking manner he said, "Well, this fellow is too young to tell me how to run my union." And that's all.

Q. You never asked Mr. Atkins if he had a job for Mr. Tuttle, did you?

A. No, sir. No, sir.

Q. Did you personally know of any warehouse openings that were available for Mr. Tuttle?

A. I knew there was a warehouse opening.

Q. When?

A. When Jack Sharp was transferred.

Q. When was he transferred?

A. Around the 1st of March.

Q. Around the 1st of March?

A. Yes, sir.

Q. Was a man hired to replace Mr. Sharp?

A. Pardon?

Q. Was a man hired to fill Mr. Sharp's place?

A. Somebody had to be hired to replace him.

Q. Didn't you have enough men on duty at that time to fill all three shifts?

A. Not until this Myers was hired.

(Testimony of Leon Maples.)

Q. When was he hired?

A. Around the 1st of March.

Q. To your understanding, did Mr. Myers come to work before Mr. Sharp left?

A. I don't remember. It was either — no, he didn't. Or did he? No, sir.

Q. Then, since this first day that you met Mr. Tuttle you did not again see Mr. Tuttle up at the Black Rock warehouse, is that correct?

A. I beg your pardon?

Q. After the first day that you met Mr. Tuttle on Monday, the 25th of February, you did not then again see Mr. Tuttle up at Black Rock, is that correct?

A. I stated awhile ago that Mr. Tuttle came up there.

Q. Did you see him? A. Yes.

Q. When?

A. It was around the 15th of March.

Q. About what time?

A. I would have to guess, but I would say it was in the afternoon, around 1 or 2 o'clock. [113]

Q. What were you doing in the warehouse at that time?

A. I was working the day shift at that time.

Q. The day shift? A. Yes.

Q. Mr. Sharp was working the day shift?

A. Mr. Sharp had been transferred to Wishon.

Q. Already?

A. When Myers came, or a day or two before Myers came, Mr. Sharp was transferred to Wishon.

(Testimony of Leon Maples.)

That was around the 1st of March. Myers came to work in that vicinity there.

Q. You hadn't advised Mr. Tuttle in the meantime that there might be a job available up there when you terminated to get married, had you?

A. Oh, I don't know. I think it was common knowledge that I was quitting then.

Q. Had you mentioned to Mr. Tuttle that there may be an opening when you quit?

A. I couldn't answer that. I don't know.

Q. Did you write a note on an envelope and send it down to him?

A. You know, I was thinking about that awhile ago. That sounds familiar, but I can't remember it. If I could see the envelope, I could tell if it was my writing.

Q. You could have put it on there, thinking that he could come up there and talk to Atkins again, is that right, about a job? [114]

A. I very likely may have.

Q. Did you recommend to Mr. Atkins that Mr. Tuttle be hired?

A. I didn't know Mr. Tuttle. I couldn't recommend him.

Q. Then, when Mr. Tuttle got up there sometime around the first week of March, he spoke to you and then went to see Mr. Atkins, is that correct?

A. I imagine that is about it, yes.

Q. You didn't overhear any of that conversation?

(Testimony of Leon Maples.)

A. Well, now, yes, I did. I was in the office at the time, and that is the conversation where Mr. Atkins told Tuttle that he had put in a requisition for him by name at the time that Jack was leaving and before this Myers came up there.

Q. Did Mr. Tuttle tell Mr. Atkins that he had had trouble with the union?

A. I believe so, yes. I believe so.

Q. What did Mr. Atkins say to any remark like that? Do you recall?

A. Well, if there was any remark, it was an unimportant one. I mean I can't remember it, but I am sure that John either changed the subject or dismissed it.

Q. In your conversation with Mr. Fudge, that was purely for a personal interest, is that right?

A. Well, I don't know how to answer that.

Q. Well, let me put it this way: Mr. Fudge, according to [115] your testimony, implied that it was not really much of your business, isn't that right?

A. More or less, yes.

Q. Why did you consider it your business?

A. Well, look. He was my business agent and I felt like I ought to carry on a conversation with him, and I guess I am kind of popular for opening my mouth at the wrong time, and that was one of those times. And just as soon as Mr. Fudge said what he did, well, I figured well, now is a good time for me to shut up. I mean, it was a little late, but I did shut up then.

Q. Well, you admit that you were not repre-

(Testimony of Leon Maples.)

sending Kings River Constructors or any job management in asking Mr. Fudge anything about Mr. Tuttle, is that correct?

A. Very much so.

Mr. Smith: I have nothing further.

Trial Examiner: You have testified that you overheard Mr. Atkins say to Mr. Tuttle that he had made a requisition for him?

The Witness: Yes, sir.

Trial Examiner: That he had sent in his name?

The Witness: Yes, sir.

Trial Examiner: Did he state to whom he had made the requisition, to whom he had sent the name? Did he mention "union," himself? [116]

The Witness: No, sir. He never mentioned the word "union" to my knowledge, to my memory. He said, "I made a requisition for you by name." But I don't recall him saying that he made the requisition to the union at all. And I am inclined to say that he didn't say that.

Redirect Examination

Q. (By Mr. Yeates): Did he identify any names other than——

A. Well, it is—Mr. Atkins did have a phone in the warehouse with which to call to town, and it wasn't possible for him to call——

Q. Well, I know. The question I asked you is this: At the time he mentioned, in conversation you overheard, when he was mentioning to Mr. Tuttle a requisition by name, I believe your state-

(Testimony of Leon Maples.)

ment was that he wasn't available, did he make any statement of any names, name any names other than Mr. Tuttle's name?

A. He said, "I put in a requisition for you by name and Mr. Wolcott said you weren't available"—I think that's right.

Q. Were there any other names mentioned?

A. Not that I remember.

Mr. Yeates: Nothing further.

Recross Examination

Q. (By Mr. Smith): You are not firmly sure of any of the content of these conversations, are you?

A. This has been a year and, at best, I don't have a good memory. [117] And this was all at the time just trivial conversation that I would forget tomorrow. So I couldn't be sure of what exactly was said at all. But, to the best of my knowledge and memory, what I have told you is true.

Q. You are familiar with your hiring procedure at Black Rock, aren't you, somewhat?

A. No, I wouldn't say I am.

Mr. Smith: That is all.

Further Redirect Examination

Q. (By Mr. Yeates): Do you recall whether or not there were any conversations between Mr. Tuttle and Mr. Atkins concerning Mr. Tuttle's trouble with Mr. Fudge?

A. Well, I don't know if I overheard the con-

(Testimony of Leon Maples.)

versation or if Mr. Atkins told me about it or if Tuttle told me and then I told Atkins, but we got in on the, we were more or less informed that he had had a disagreement with Mr. Fudge.

Q. Do you know whether that was said by Mr. Tuttle to Mr. Atkins or by Mr. Atkins to you? Do you know?

A. I am sort of inclined to think that Mr. Tuttle told me——

Q. I don't want what you are inclined to think. Do you know?

A. Well, I don't know.

Mr. Yeates: Nothing further.

Trial Examiner: You are excused, sir.

(Witness excused.) [118]

Trial Examiner: We will take a 10-minute recess.

(Short recess.)

Trial Examiner: Are you ready to proceed?

Mr. Yeates: General Counsel is ready.

Mr. Smith: Respondent is ready.

Mr. Yeates: At this time General Counsel rests.

Trial Examiner: What is the Respondent's pleasure?

Mr. Smith: At this time Respondent wishes to make the usual motion that the complaint be dismissed.

Trial Examiner: I think I would not want to grant your motion without having studied the transcript, what has been said thus far. Do you want to argue the motion? Is it your contention here

that the General Counsel has not made a prima facie case?

Mr. Smith: It is our contention that the only evidence in the record that Mr. Tuttle was denied employment by Kings River Constructors because the union refused to clear Mr. Tuttle is some testimony to the effect that Mr. Bert Perkins, project manager of Morrison, Walsh and Perini, a neighboring contractor, suggested to Mr. Tuttle that he apply at Black Rock warehouse for employment and that he clear with the union. At no point has the General Counsel established that the union did, in fact, refuse to clear Mr. Tuttle and, as a matter of fact, at no point has it been established that Kings River Constructors had requested the union to clear Mr. Tuttle. [119] Nor has it been established that there was, in fact, an opening in the warehouse for which a warehouseman was needed. It is the contention of the Respondent that at no time did it offer a position to Mr. Tuttle nor did it at any time have a position for which Mr. Tuttle could have been employed.

Trial Examiner: Do you want to be heard, Mr. Yeates? I take it, first, you would have to present proof that there was a job opening to which Mr. Tuttle would have been appointed, except that the union refused him clearance; you would have to prove that to have a case, wouldn't you?

Mr. Yeates: Well, General Counsel doesn't say that they absolutely have to show that there was a job opened. If employer's requirement of clearance by the union would have necessitated him get-

ting the clearance, then, under your Swinnerton-Walburg and your Utah Construction theories, which are still observed by the Board, there is where your discrimination starts.

Trial Examiner: Well, do you mean—yes, I recall the Swinnerton-Walburg case—you mean the applicant goes to the company and the company says, “You can only be employed if you get cleared through the union”?

Mr. Yeates: If they require the clearance as a condition of employment.

Trial Examiner: You would have to show nothing further under Swinnerton-Walburg?

Mr. Yeates: That is right. [120]

Trial Examiner: I think that is correct. Whose testimony do you claim established that fact?

Mr. Yeates: I claim that Mr. Perkins’ testimony, inasmuch as there had been——

Mr. Smith: Mr. Perkins has not testified.

Mr. Yeates: I meant, rather, the testimony of Mr. Sharp and Mr. Tuttle’s statements by Mr. Perkins and the statements made by Mr. Atkins to them showed that the clearance was a condition for employment.

Trial Examiner: Well, I think Mr. Tuttle testified to the fact that Mr. Perkins said that he should clear with the union.

Mr. Yeates: That is right.

Trial Examiner: I don’t know that he testified that Mr. Perkins says you can only be employed if you clear through the union, Mr. Yeates. If I credit Mr. Tuttle’s testimony in toto, there is some

testimony to the effect that Mr. Perkins did certainly suggest—

Mr. Yeates: He said, "Go get cleared with the union and then report to work."

Trial Examiner: Something to that effect. I believe the company claims that Mr. Perkins was not at that time acting in a representative capacity. What would you have to say to that?

Mr. Yeates: Well, Mr. Perkins has identified himself [121] with the work up there, on the transfer of Sharp. But the main position is the statement of Mr. Atkins that he requisitioned this employee and because of the failure of Mr. Fudge to clear him he could not work at that project.

Trial Examiner: Who testified to that?

Mr. Yeates: Mr. Tuttle. And Mr. Maples testified to it, in part.

Trial Examiner: Well, you remember, I asked the last witness some pretty pointed questions on that requisition statement of Atkins and all he could come up with there was that the name mentioned was Wolcott. But I don't think he contributed a great deal to the General Counsel's case on that point. I am not too clear on what Mr. Tuttle testified to on that point. But possibly Mr. Tuttle's testimony credited with respect to Atkins' statement may be sufficient from your point of view.

Mr. Yeates: Yes.

Trial Examiner: Well, I just have to read the transcript. I can't grant your motion at this time. I can reserve ruling, now, for purposes of going

ahead, the same as if I denied it at this time, without prejudice of course.

Mr. Smith: I would like to make one more cross-argument here. We feel that to have the application of the law of the cases cited by counsel for the General Counsel, it would have to be established that it was the general or usual practice [122] for the employer to demand clearance from the union prior to employment of an individual and that in the event clearance was refused the individual would not be employed.

Trial Examiner: That was pretty well established in Swinnerton-Walburg. I recall the case because I heard the case. That is my recollection of what was established in that case.

Mr. Smith: The fact in this case, which I think the General Counsel is aware of through their investigation, is that the union did not at any time refuse to clear Mr. Tuttle, because the union, in accordance with the well accepted and established practice of the company, was not requested to clear Mr. Tuttle.

Trial Examiner: You mean was not requested by the company to clear Mr. Tuttle?

Mr. Smith: By the company or any authorized representative of the company through which the union knew that they were to deal. I think that General Counsel has the unsupported statement of opinion of the charging party as to why he did not get a job at the Black Rock project shortly after he applied for the same with Mr. Perkins

and with Mr. Atkins. But I might point out that there has been nothing to show here and, as a matter of fact, the facts will prove to the contrary, that Mr. Tuttle would even have knowledge of the hiring process in that respect and would even know whether or not the company had requested them until the company told Mr. Tuttle [123] that they had hired him for that position and that they had requested his clearance by the union, if in fact the company would even request clearance in his case.

Mr. Yeates: The testimony, I believe, will show that Mr. Tuttle gave the statement given to him by Mr. Atkins, the immediate supervisor, that he had requested, or requisitioned, him by name and that Mr. Fudge had said that he was not available. Now, that is the statement that Mr. Tuttle states was made to him. And, in addition to your statement, you have a series of things here you have to consider, and I don't know if it should be argued here or later, but the fact that there were people coming and going from this warehouse and that they were made known of Mr. Tuttle's availability and that he was there and that at the time he was called up or somebody had given him the message to go to the Black Rock project, there was going to be an opening in the work there—there was one case, Sharp was being transferred; in another case, Myers left—and on these types of things, where you have these arrangements, you don't get it printed out. There are a lot of these things you read from just the way that the facts fall into line rather than from a guided path with pointers.

Trial Examiner: Of course, the Trial Examiner likes to have as many pointers as possible.

Mr. Yeates: Well, General Counsel likes to have pointers, too. [124]

Mr. Smith: I submit that the counsel for General Counsel has not established by any testimony any arrangement or usual practice. He has confined his case strictly to Mr. M. E. Tuttle and to the one statement of Mr. John Atkins, the warehouse supervisor. Admitting, or assuming for the purposes of this motion only, this argument that Mr. Atkins had, in fact, made that statement, I submit that the statement, itself, does not constitute an unfair labor practice under the Act, in that Mr. Atkins' statement, as set forth by counsel in his argument is to the effect that Mr. Tuttle—he had talked with Mr. Fudge, he had requisitioned Mr. Tuttle by name. He does not say to whom he directed a requisition nor does he say that a requisition was ultimately directed to the union.

Mr. Yeates: Are you saying as to Mr. Maples or as to Mr. Tuttle?

Mr. Smith: As to Mr. Tuttle's statement that you just described. And there is a vital link missing, you see, that when Mr. Fudge replied that he was not available for work, it does not say that Mr. Fudge refused to clear Mr. Tuttle upon the request of Kings River Constructors. And that must be the basis of any unfair labor practice charges.

Trial Examiner: Well, I will just have to read the testimony. I at this time am by no means cer-

tain essentially what Mr. Tuttle's testimony was on that point. Besides, you have the matter of credibility. [125]

Did you want to present a witness? Did you want to proceed now or did you want to have a recess?

Mr. Smith: I think we are ready to proceed.

Trial Examiner: Very well.

Mr. Smith: I would like to call Mr. Bert Perkins.

BERTRAM LUCIAN PERKINS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Smith): Will you state your full name? A. Bertram Lucian Perkins.

Q. And your address?

A. 4846 Libbit, Encino, California.

Q. During the period February 1 to April 15, 1957, what was your occupation?

A. I was project manager for Morrison, Walsh & Perini on the Wishon Dam.

Q. As project manager for Morrison, Walsh & Perini on the Wishon Dam, did you have any authority or any connection with any other construction projects in the area?

A. None whatsoever.

Q. Do you know the charging party in this case, Mr. M. E. Tuttle? A. Yes, I do.

Q. When did you first meet Mr. Tuttle? [126]

A. Beardsley Dam.

(Testimony of Bertram Lucian Perkins.)

Q. I believe you were present this morning when Mr. Tuttle testified, and that is the same Beardsley Dam on which he was employed?

A. That is correct.

Q. By Tri-Dam Constructors?

A. That is right.

Q. What was your position with Tri-Dam Constructors? A. General superintendent.

Q. Who did you work for?

A. I worked for Tri-Dam Constructors.

Q. Who was your immediate superior?

A. My immediate superior was O. H. Tucker, who was the project manager.

Q. Did you have any basis on which to judge Mr. Tuttle's work abilities?

A. Yes. He didn't work directly for me. He worked indirectly. But I observed his activities.

Q. When did you leave Tri-Dam Constructors?

A. About a year ago in September.

Q. That would be September of 1956?

A. '56, yes.

Q. And where did you go at that time?

A. I went to Wishon Dam, Morrison, Walsh & Perini.

Q. You were project manager? [127]

A. I went in there as general superintendent.

Q. When did you become project manager?

A. Project manager in November.

Q. 1956? A. Of the same year.

Q. 1956? A. Yes.

(Testimony of Bertram Lucian Perkins.)

Q. Do you recall meeting Mr. Tuttle in Fresno, California? A. Yes, I do.

Q. Will you state where and when this meeting occurred?

A. Yes. It was in the Fresno Hotel Coffee Shop. He came in with Jack Sharp and——

Q. And were there other persons with him?

A. Yes. I believe Ward was there, and Billings, and that is all I remember at the moment.

Q. Do you recall the purpose of Mr. Sharp's and Mr. Tuttle's visit to you at the coffee shop?

A. Yes. Sharp knew that he was going to be released from that job eventually to go back to work for me up on the canyon and the time was getting when we were about to open up Wishon Dam, and he came down to see if I had obtained a clearance from Jack DeLay who would have to release him in order for me to hire him.

Q. Who is Mr. DeLay?

A. Project manager for Kings River Constructors. [128]

Q. And Mr. DeLay, as such, was Mr. Sharp's employer at that time? A. That is right.

Q. What promises, if any, had you made to Mr. Sharp concerning employment at Wishon Dam?

A. I told Mr. Sharp if Jack DeLay would release him there I would put him to work at Wishon Dam.

Q. When did you tell Mr. Sharp this?

A. I can't say.

Q. Had you spoken to Mr. DeLay prior to your

(Testimony of Bertram Lucian Perkins.)

meeting with Mr. Sharp? A. Oh, yes.

Q. You came to speak to Mr. DeLay about Mr. Sharp?

A. Yes, I had to talk him into turning him loose, or I could not have gotten him.

Q. Had you spoken to Mr. Atkins about Mr. Sharp being released to work at Wishon?

A. To the best of my knowledge, I didn't. Now, I may have because, I mean, that wouldn't be normal procedure, I mean I would go to the project manager, who, in turn, would take care of that.

Q. You did not—

A. But I may have. I wouldn't say.

Q. Do you remember, do you recall the statement of Mr. Sharp that you had visited John Atkins on Friday, the day before [129] your meeting with Mr. Sharp and Mr. Tuttle at the Fresno Hotel to discuss Mr. Sharp's release?

A. No. That isn't why I was there. I was down there occasionally because my boss and Jack's boss, the district manager, used to fly into Wishon and then we went down over on the other projects, he went over to my projects there, and when he covered the other projects he would ride with me, I would be his chauffeur. So I was down there occasionally.

Q. Who is your boss? A. Jim Wells.

Q. The district manager?

A. Of Morrison-Knudsen Company.

Q. What interest did Morrison-Knudsen have in your job and Mr. DeLay's job?

(Testimony of Bertram Lucian Perkins.)

A. Morrison-Knudsen Company were the sponsoring partner.

Q. Were the sponsoring partner of what?

A. Of Morrison - Walsh - Perini joint venture. And they also were of the Kings River Constructors.

Q. But were these joint ventures of the same companies or were they different groups?

A. No; they were different companies. They were separate entities completely, different partners and different jobs completely.

Q. So between you and Mr. DeLay there was no connection except that you worked for a—

A. Parallel job, I mean. He ran one job and I ran another.

Q. Would you relate what was said at this meeting held in the Fresno Hotel coffee shop the morning of Saturday, February 23rd?

A. Jack Sharp was trying to promote Tuttle for the job that he would be vacating. I told him at that time that I had succeeded in getting Jack DeLay to release him so that he would be terminated there and be available for hire by me. I also told him that he could pick up his union referral, and there was not anything contingent, as to his employment, on that—I mean it's just procedure.

Q. Sharp's or Tuttle's employment?

A. Sharp's. That he go pick up his referral from the union and be there at whatever time he would be released.

(Testimony of Bertram Lucian Perkins.)

Mr. Yeates: Is that what you told him?

I am going to limit this witness to the answer.

Mr. Yeates: Is this what you told him?

The Witness: Yes.

Mr. Yeates: All of these remarks that you said it was not in any way contingent as to his employment——?

The Witness: No. I was just trying to clarify the point that I brought out there earlier.

Mr. Yeates: You were doing that on your own, you mean?

The Witness: Yes.

Mr. Yeates: Just so I understand it. [131]

Q. (By Mr. Smith): Trying to limit this conversation to what you said and what Mr. Sharp said and what Mr. Tuttle said on this occasion, will you please——

A. Well, I told him, Mr. Sharp, that I had obtained his release from Mr. DeLay and that as soon as he could replace him he would be available for termination there and for me to hire him. And I didn't give him an exact date because I didn't know the exact date, but it would be somewhere in the near future from there. He asked me about Tuttle, saying, "You know Tuttle," and "He could fill that job." And I don't know the exact words, but I told him something to the effect that I had nothing to do with that project, but we hired through Jim Wolcott and that he should see them.

Q. Did you tell him to see the union?

A. I probably did. I probably told him to see

(Testimony of Bertram Lucian Perkins.)

the union, and I probably told him to see Jim Wolcott. That would be the normal procedure.

Q. You promised him a job at Kings River Constructors?

A. I didn't promise him any job.

Q. Did you have authority to promise him a job there?

A. I didn't have the authority to promise him a job there.

Q. Were you hiring the warehousemen at Wishon at that time?

A. If we weren't at the time, it was very shortly right thereafter.

Q. Would you have authority to promise a man a job at Wishon?

A. Yes, I would.

Q. Did you promise Mr. Tuttle a job at Wishon?

A. I did not promise him a job at Wishon, no.

Q. If you were promising jobs for any employer, would you likely be promising them for Wishon?

A. That would be the only person that I could promise a job with.

Q. Was that the only concern that you could promise a job with?

A. Absolutely.

Q. If Mr. Tuttle had asked you for a position at Wishon, would you have hired him?

Mr. Yeates: Wait a minute. I think we are getting pretty conjectural here.

Trial Examiner: I agree.

Mr. Yeates: I am going to object to that.

Trial Examiner: I don't think that would make

(Testimony of Bertram Lucian Perkins.)

any particular difference, whether he would have had him at Wishon.

Q. (By Mr. Smith): Did you see Mr. Tuttle after that date?

A. I can't say that I did or that I didn't.

Q. You were sitting here in the room this morning, weren't you, Mr. Perkins, when Mr. Tuttle testified that you met him at the door of the Morrison-Walsh-Perini office and took him into Mr. Wolcott's office? [133]

A. Yes, I was.

Q. Do you recall that? A. No.

Q. You don't recall that you did that?

A. No. It is perfectly possible that I did, because that is where the people fill out applications for jobs. But I never mentioned Mr. Tuttle to Mr. Wolcott, never took him in.

Mr. Smith: That is all.

Cross Examination

Q. (By Mr. Yeates): The Morrison-Knudsen Company is the sponsoring company for Morrison-Walsh-Perini, is that right?

A. Morrison-Walsh-Perini, that is correct.

Q. And also for the Kings River Constructors?

A. Yes, they are.

Q. By "sponsoring," you mean the one who takes charge of doing the work?

A. Not exactly. The projects are autonomous. However, if you have a problem that goes beyond what you can handle in the field, as project man-

(Testimony of Bertram Lucian Perkins.)

ager on a project, you have to have somebody to go to, and of course you can't go to all three or four or five sponsors, I mean companies, so they designate one of the companies in the partnership to take your higher-level problems to.

Q. That Morrison-Knudsen traditionally does that type of thing in this work, they take the sponsoring—— [134]

A. Not necessarily, no. Some they take and some they don't. They just sort of split it up.

Q. In the case of Kings River and this case, the other one you referred to for Wishon, it was a case of Morrison doing it for both?

A. That is right.

Q. Mr. Wolcott, who was labor coordinator, was working on both projects?

A. That is right. Mr. Wolcott was labor coordinator for everything in Kings River Canyon.

Q. And that would include Wishon and Black Rock?

A. That is right.

Q. How long have you been employed by Morrison-Knudsen?

A. Eleven years.

Q. What is your present position and by whom are you employed?

A. I am employed by Morrison-Knudsen & Company. I am district superintendent, from Los Angeles.

Q. The other project manager was Mr. Delaney?

A. Mr. DeLay.

Q. Mr. DeLay?

A. Right.

Q. On your arrangement before Sharp went to

(Testimony of Bertram Lucian Perkins.)

Wishon, had you talked that over before with Mr. DeLay? A. Oh, yes.

Q. And he wanted a warehouseman, is that the reason? [135]

A. No. No. He said that he would release him. Of course, he wouldn't release him until we got a——

Q. (Interrupting): No; this was before, when he was at Wishon? A. Yes.

Q. I understand, Mr. Sharp was at Wishon first? A. Yes.

Q. And then went to Black Rock. A. Yes.

Q. Was that by an arrangement between you and DeLay? A. That is correct.

Q. And then when Wishon felt they had a need for him, you went to Mr. DeLay to release him to send him over to you? A. Right.

Q. Was this done through Mr. Wolcott?

A. Oh, yes.

Q. From both of you? A. Right.

Q. Do you recall an interview by a representative of the National Labor Relations Board investigating this case?

A. Yes; a Mr. Schneider called me up there on the phone.

Q. Did he see you in person or by telephone?

A. By telephone.

Q. And at that time did you make a statement to him regarding this matter over the telephone?

A. We discussed it, yes.

Q. Was there any mention made to you at that

(Testimony of Bertram Lucian Perkins.)

time regarding Mr. Tuttle's seeking the job at Black Rock project? A. Yes.

Q. As I understand, you did not sign any statement in this regard? A. No.

Q. At this time did you, in conversation you had with Mr. Schneider, ever make a statement to Mr. Schneider, in reply to Sharp's mention of Tuttle being available for the job: "I informed Mr. Tuttle the job was open but that he would have to clear with the Teamsters Union at Fresno with respect to it"?

A. That is incorrectly stated.

Q. That is not the statement you made at that time? A. No, sir.

Q. What is the statement you made at that time?

A. The statement I made at that time was that I told him, I undoubtedly did say the job was open—I mean, it was rather obvious to me that it was—at the same time, it could have been filled by him, too, I don't know, but what I told him was that I didn't do the hiring for the job, that I didn't have anything to do with the job personally, but that the two things that I recommended that he do, one was to see Wolcott to get, make an application; and the other thing, [137] very often we ask, we call a union for men when we need men, and I suggested that he get his card in there where he would be on their list.

Q. But at this time you state you never did say to him that he would have to clear with the Teamsters Union at Fresno with respect to it?

(Testimony of Bertram Lucian Perkins.)

A. I did not say that he would have to do anything, no.

Q. And you are positive now that you never made that statement to the examiner?

A. Yes, to the best of my memory.

Q. Well, this statement was made—do you recall the date that this statement was made?

A. No, I don't.

Q. Would it have been in May of 1957?

A. It could have been.

Q. That could have been the day?

A. It could have been.

Q. And the matter we are referring to happened around February of 1957, is that right, in connection with Mr. Tuttle? A. Yes.

Q. And the statement you gave, whether it was this or whatever you gave to Mr. Schneider, was closer reference to the date of this occurrence than now, is that right? A. That is correct. [138]

Q. Now, after your conversation with Mr. Tuttle did you have conversation with Mr. Wolcott or with Mr. Atkins concerning your conversation with Mr. Tuttle?

A. No, I didn't. I never recommended him or mentioned him.

Q. Did you have any conversation prior to giving this statement with Mr. Wolcott about the statement you had given to the representative of the Board? A. No.

Trial Examiner: Read that, Mr. Reporter.

(Last question read.)

(Testimony of Bertram Lucian Perkins.)

Mr. Yeates: Strike everything out on that one.

Trial Examiner: Strike it.

Q. (By Mr. Yeates): Did you have any conversation with Mr. Wolcott or Mr. Smith, attorney for the company, concerning this matter of Tuttle prior to the date you gave this statement to Mr. Schneider?

Mr. Smith: I will object here on one little point, that it has not been established that Mr. Perkins gave a statement to Mr. Schneider. He had a telephone conversation with Mr. Schneider. Somehow that was reduced, or a statement evolved from it; I presume Mr. Schneider typed it up. I am not sure that Mr. Wolcott even saw the statement.

Trial Examiner: You object to the form of the question?

Mr. Smith: I certainly do.

Trial Examiner: Maybe you had better reframe it, since [139] it was a telephone conversation.

Mr. Yeates: All right, I will state it this way:

Q. (By Mr. Yeates): From the date of the incident concerning yourself and Mr. Tuttle at Fresno to the time that you had the telephone conversation with Mr. Schneider concerning this matter had you discussed the incident with Mr. Smith or Mr. Wolcott for the company?

A. Not to my knowledge.

Q. You stated in your earlier testimony that you might have talked with Atkins about the transfer or the replacement of Sharp, who was going to Wishon. Could the statement that was made by Mr. Sharp have been correct?

(Testimony of Bertram Lucian Perkins.)

A. I wouldn't say it could or couldn't. I had no dealings with Mr. Atkins at the time actually at all, except just as a point of information, if I did happen to mention it.

Q. But it could have taken place as he stated?

A. That is possible.

Mr. Yeates: That is all.

Mr. Smith: Nothing further.

Trial Examiner: You are excused, Mr. Perkins.
Thank you.

(Witness excused.)

Mr. Smith: I would like to call John Atkins.

JOHN E. ATKINS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [140]

Direct Examination

Q. (By Mr. Smith): Will you state your full name?

A. John E. Atkins.

Q. And your address?

A. Post Office Box O, North Fork, Madera County, California.

Q. Mr. Atkins, are you the same John Atkins who was a warehouse manager for Kings River Constructors' Black Rock project from February 1 through April 15?

A. I am.

Q. When were you employed in this position at Black Rock?

A. November of 1956.

Q. November of 1956?

(Testimony of John E. Atkins.)

A. That could be October.

Q. Mr. Atkins, are you acquainted with the charging party in this case, Mr. M. E. Tuttle?

A. I have met him twice.

Q. When was the first time that you had occasion to meet Mr. Tuttle?

A. When he came up to Black Rock seeking employment.

Q. When was that?

A. Approximately February the 25th, I believe. It was on a Monday.

Q. Where did you see Mr. Tuttle?

A. I was in the office and——

Q. Warehouse office? [141]

A. The warehouse office up at Black Rock—when Mr. Jack Sharp called me out and said that he had a party there that he would like for me to meet. And it was Mr. Tuttle.

Q. And had Mr. Sharp mentioned Mr. Tuttle to you prior to the time you met Mr. Tuttle?

A. About, oh, I would say four days before he had mentioned that Mr. Tuttle was available for work and that he was a good warehouseman and that he would like to have me put him on.

Q. At that time did you have an opening in the warehouse?

A. At the time that he suggested that there was an opening coming up, yes.

Q. There was an opening coming up?

A. Yes.

Q. At the time that you had this conversation,

(Testimony of John E. Atkins.)

or that you first met Mr. Tuttle, was there a warehouse opening?

A. No. I understand that Mr. Sharp tried to contact Mr. Tuttle but there was a delay for some reason and by the time Mr. Tuttle arrived at the job the position had been filled. So there was no——

Q. On that Monday? A. That is right.

Q. Now, were you aware at that time that Mr. Sharp intended to terminate at Black Rock and go to work for Morrison-Walsh-Perini?

A. At that time I believe he informed me that at sometime [142] he would be asked to go back to Wishon.

Q. Do you recall a visit from Mr. Bert Perkins on Friday or Saturday preceding this Monday in question, during which time Mr. Perkins informed you that the way had been cleared for Mr. Sharp to go to work for Morrison-Walsh-Perini?

A. No, I do not.

Q. You recall no such conversation?

A. No, I do not.

Q. What were the circumstances of your first meeting with Mr. Tuttle?

A. Well, I believe it was in response to my telling Jack to have Mr. Tuttle get in touch with me at the time that this opening, the first opening, appeared. But in the delay the position was filled because Mr. Tuttle did not arrive there in time for it.

(Testimony of John E. Atkins.)

Q. I believe you stated that you were in the warehouse office. A. That is right.

Q. Did Mr. Tuttle come in and introduce himself to you or what were the circumstances? Who was there?

A. I was in the office on the phone, I believe, either that or with some salesman, and was busy at the time, and Mr. Sharp came to the office door and informed me that he had a party out there that he would like me to meet.

Q. And then what did you do?

A. I went out after the telephone call and Mr. Sharp introduced [143] me to Mr. Tuttle.

Q. Would you recall the conversation that you had with Mr. Tuttle?

A. I believe I told Mr. Tuttle that right at that time there was no position open, the position had been filled because of the delay of him getting in there.

Q. Did you suggest to Mr. Tuttle that he leave his name and address or anything of that sort?

A. I don't believe I did, no.

Q. Do you recall any statement that Mr. Tuttle made at the time? A. No, I don't, at that time.

Q. Did you make any effort after that date to contact Mr. Tuttle?

A. Sometime after that, yes. There was to be a position open and—

Q. Did you make an effort to contact Mr. Tuttle personally?

A. Nothing; no, sir, I did not.

(Testimony of John E. Atkins.)

Q. Did you contact him personally?

A. No, sir.

Q. When was the next time you saw Mr. Tuttle?

A. He came up there the first week of March sometime.

Q. Did you ask Mr. Tuttle to come up?

A. No, I did not.

Q. And see you? [144] A. No, I did not.

Q. Did you ask anybody to have Mr. Tuttle come up and see you? A. No, I didn't.

Q. Can you tell us the circumstances of that meeting, where you were?

A. I was in the warehouse. And Mr. Tuttle said that he was looking for work and I informed him that there were no positions open at that time, they had been filled.

Q. In short, you more or less reiterated what you had said on the previous occasion, is that right?

A. That is right.

Q. Did you make any statements or were any statements made concerning the union?

A. Mr. Tuttle informed me that he was having trouble with the union.

Q. Did he advise you what the nature of the trouble was?

A. He didn't specify. He just said he was having trouble with the union.

Q. Did you make any statement regarding the union? A. No, sir.

Q. Did you make any statement regarding Mr. Tuttle's troubles? A. No, sir.

(Testimony of John E. Atkins.)

Q. Did you at any time offer Mr. Tuttle employment?

A. I couldn't. There was nothing open at the time he [145] contacted me.

Q. Did you at any time make a name requisition for Mr. Tuttle?

A. I believe first time that I called I asked for Mr. Tuttle.

Q. Asked who?

A. Asked Mr. DeLay—or Mr. Weatherman, our office manager.

Q. Did you ever call Mr. Al Fudge of the Teamsters Union concerning Mr. Tuttle?

A. No, sir.

Q. Have you ever had a conversation with Mr. Al Fudge concerning Mr. Tuttle?

A. I did not.

Q. You state you asked Mr. Weatherman.

A. That is right.

Q. For Mr. Tuttle? A. Yes, sir.

Q. When was this?

A. That was the, about the, 18th or 19th of February.

Q. Do you mean February or March?

A. That would be February. That would be before the first time that he came in to see me on the 25th.

Q. Before the first time that he came in to see you? A. That is right.

Q. And at that time you were going to have an opening, is that correct? [146]

(Testimony of John E. Atkins.)

A. That is right.

Q. This was after Mr. Sharp talked with you about Mr. Tuttle? A. That is right.

Q. Had you known Mr. Tuttle or heard of Mr. Tuttle prior to Mr. Sharp's mentioning him to you?

A. The name was familiar. He had worked at Lomolo Falls in Oregon.

Q. I see.

A. And he had passed through Klamath Falls where I was stationed at that time. But to recognize the man, because we had hundreds go through there, I wouldn't know him, no.

Q. What was the reason for this job opening around the latter part of February? Do you recall?

A. That was, I had been informed that Mr. Sharp was being transferred, or not transferred, but they wanted him to go up to Wishon and he was going into the Operating Engineers.

Q. You state that you asked Mr. Weatherman to secure Mr. Tuttle for you. A. That is right.

Q. Did you fill out any form or anything of that nature? A. No. It was verbal.

Q. By the term "requisition," are you familiar with that term? A. Well, yes.

Q. Do you use requisitions? [147]

A. No; not for requisitioning men, no.

Q. I see. But when you need a man for the warehouse, what is the process?

A. I would call Mr. Weatherman or contact him personally and tell him that I needed a man.

Q. You needed a man? A. That is right.

(Testimony of John E. Atkins.)

Q. And around the latter part of February you told Mr. Weatherman that you needed a man in the warehouse, is that correct, and asked for Mr. Tuttle by name?

A. That wasn't—well, the latter part of February, yes.

Q. The latter part of February?

A. Yes, sir.

Q. What did Mr. Weatherman advise you?

A. At that time he didn't advise me.

Q. Were you under the impression that the process was started to secure Mr. Tuttle or some other man for this opening?

A. That is right.

Q. I see. Now, are you aware of what this process is in finding a man?

A. Well, my main responsibility would be to ask Mr. Weatherman for help that I needed.

Q. I see.

A. And then he, in turn, I understand, would go through Mr. DeLay, the project manager. [148]

Q. And if Mr. DeLay said to hire a man, do you know what would happen in that case?

A. Well, I imagine it would be referred to the labor coordinator, Mr. Wolcott.

Q. Do you have occasion to contact the union or to contact an individual directly in connection with employment?

A. No, sir.

Q. At no time?

A. The—

Q. Let me put it this way: If you had a good friend or a man who had worked for you for a

(Testimony of John E. Atkins.)

period of 10 years or more—for example, we will say, a man by the name of Mike Ryan—and with whom you were on very friendly terms, would you call Mr. Ryan directly or would you go through this same process to get Mr. Ryan as you would any other man?

A. I believe in the case of Mr. Ryan I contacted the district office, Mr. Marv Muller.

Q. You contacted them direct?

A. That is right. And I asked if Mr. Ryan was available, that I would like to procure him. And at that time I was informed that he was not available.

Q. I see. And then what was your procedure?

A. Then I put a request in for a man and about four hours later I received a call from Los Angeles, from Mr. Muller, that Mr. Ryan would be available. And I asked to have him come in. [149]

Mr. Yeates: Has this date been identified?

Mr. Smith: What?

Mr. Yeates: Has the date been identified on this?

Mr. Smith: No, the dates have not been identified.

Mr. Yeates: On this particular one?

Mr. Smith: I am seeking to establish this hiring procedure.

Q. (By Mr. Smith): When you found out Ryan was available did you call Mr. Ryan directly yourself?

A. No, sir.

Q. What did you do?

A. I informed Mr. Weatherman that Mr. Ryan

(Testimony of John E. Atkins.)

was available and that I would like to have him because he had worked for me off and on for the last ten years.

Q. Did Mr. Ryan come to work for you?

A. Yes, he did.

Q. Did Mr. Wolcott bring him up?

A. No, sir.

Q. Did Mr. Ryan come in and sign up directly with you or did he sign up with some other department?

A. He would have to sign up with the office and come down with a clearance slip from the office to me.

Q. And that clearance slip from the office to you, did that authorize you then to——

A. To put him to work.

Q. To put him to work? [150]

A. Yes, sir.

Q. Mr. Atkins, you stated, I believe, previously that you had called or had asked Mr. Weatherman to get you a warehouseman and had mentioned it to him that Mr. Tuttle was available.

A. That is right.

Q. As Mr. Sharp had told you several days prior to bringing Tuttle in? A. That is right.

Q. Now, on the day that Tuttle came to see you, you said that the job had already been filled?

A. That is right.

Q. When were you advised the job had been filled?

A. I believe on a Saturday evening Mr. Weath-

(Testimony of John E. Atkins.)

erman had informed me that they had filled the position.

Q. And who did fill that position?

A. I believe that was Mr. Myers.

Q. Mr. Myers. You stated that—or it was stated while you were sitting in this room—that the next time you saw Mr. Tuttle was in March, the early part of March.

A. That is right.

Q. Can you recall the date?

A. Not exactly. It was the first week of March, I would think.

Q. And I believe you stated also you had no job opening at that time. [151]

A. That is right.

Q. When was the next warehouse opening, after March 8th? Do you recall?

A. I believe in April. I am not positive on that. Or the middle of March.

Q. Do you recall when Mike Ryan was hired?

A. Yes, sir.

Q. When was that?

A. I don't believe I could give you a specific date.

Q. Was the next job opening after the 8th of March, though, filled by Mr. Ryan?

A. Yes. That was the last job opening that we actually filled.

Q. Yes?

A. There was another opening to come up when Mr. Maples was to be married. And I put a call in for Mr. Tuttle at that time also.

(Testimony of John E. Atkins.)

Q. You put a call in for Mr. Tuttle at that time? A. That is right.

Q. Who did you call?

A. I called Mr. Weatherman and asked him to get Mr. Tuttle, that we had another opening coming up.

Q. The opening opened about——

A. Let me see.

Q. Excuse me. When did Mr. Maples, or when was it expected [152] that he would, leave?

A. Well, he said sometime the early part of April. I think it was the 12th or somewhere close to that.

Q. I see. And did you get ahold of Mr. Tuttle?

A. I did not directly, no, sir. I just put the call in to Mr. Weatherman and the procedure went on from there.

Q. What happened to that job opening?

A. Well, before Mr. Maples or at the time that Mr. Maples quit to get married Mr. Jim Wells, the district manager, appeared and informed me that they were shutting off both the graveyard and the swing shift and, therefore, there would be no opening for anyone.

Q. When the decision was made to reduce, to eliminate three shifts and go back to one shift—is that correct?

A. That is correct, that is right.

Q. (Continuing) ——did that put you in the position of having to reduce forces at the warehouse? A. That is right.

(Testimony of John E. Atkins.)

Q. And did you reduce forces?

A. I did. I reduced—Mr. Maples quit on the 12th and on the 13th I terminated Mr. Weatherman.

Q. You terminated Mr. Weatherman?

A. Yes. That is the nephew of the office man.

Q. So instead of one job opening being available, as a matter of fact, two jobs went out of existence? [153]

A. Two terminations, yes, that is right.

Mr. Smith: Your witness.

Cross Examination

Q. (By Mr. Yeates): This District Manager Wells you speak of, is that for the Kings River Constructors? A. That is right.

Q. Was that also for the Wishon project?

A. He has the authority over all of the projects in the southern California district.

Q. And Mr. Perkins would have worked under him, Mr. Wells?

A. On the Wishon project, yes, sir.

Q. And it was Mr. Wells who made the decision to terminate the shift on the Black Rock project?

A. That is right.

Q. You have worked with Morrison-Knudsen how long? A. Seventeen years.

Q. And at your present job, are you still under the employment of Morrison-Knudsen?

A. Under a joint venture, Macco-Morrison-Knudsen.

(Testimony of John E. Atkins.)

Q. Is that the Kings River Constructors or is that a different one?

A. No, sir; that is a different one.

Q. Is Morrison the sponsoring company in that one, Morrison-Knudsen?

A. No, sir; Macco. [154]

Q. But you are still employed by Morrison-Knudsen there?

A. I am employed by the joint venture.

Q. I see. Have you in the past been employed by the joint venture and then gone back to Morrison-Knudsen?

A. That is right, sir.

Q. And that was true of the Beardsley or whatever that project was, too?

A. I was not on that project.

Q. Then, the Lomolo, the one where you were employed, Mr. Atkins, when you first knew Mr. Tuttle——

A. As far as knowing Mr. Tuttle, the only time that I actually met Mr. Tuttle——

Q. I was just giving you that to identify the job.

A. At Lomolo?

Q. At Lomolo, in Oregon.

A. In Oregon, yes.

Q. At that time you were employed by a joint venture?

A. No. That was a straight Morrison-Knudsen job.

Q. The supervisors, such as project managers, who have worked at these jobs on the joint ventures, are they very often the same in each of

(Testimony of John E. Atkins.)

the joint ventures as far as Morrison & Knudsen personnel go? A. No.

Q. Have you worked with Mr. Perkins on any joint ventures before? [155]

A. No, I haven't.

Q. Have you with Mr. Wolcott?

A. No, sir.

Q. Have you with Mr. Wells?

A. Yes, sir.

Q. You stated that you do not hire people directly. A. Not directly.

Q. You go through Mr. Weatherman?

A. I——

Q. Who, in turn, goes through another gentleman, who in turn goes through another gentleman?

A. Different projects are set up differently. Sometimes you are under the jurisdiction of the master mechanic when you are in the warehouse.

Q. The particular job at Kings River?

A. Kings River, I was under Mr. Weatherman there, the office manager.

Q. So you would go through Mr. Weatherman?

A. That is right.

Q. And Mr. Weatherman would go through someone else? A. Mr. Jack DeLay.

Q. And Mr. DeLay would go through Mr. Wolcott?

A. In the case of hiring, I imagine so, yes, sir.

Q. Now, that was true with respect to all people you hired at your Black Rock project? [156]

A. That is right.

(Testimony of John E. Atkins.)

Q. That was true of Mr. Maples?

A. Yes, sir.

Q. You did not hire Mr. Maples directly?

A. I couldn't hire him directly. It would have to go through the office.

Q. Were you present in the courtroom earlier when Mr. Maples said that you hired him for the job?

A. Well, that is literally speaking. I recommended Mr. Weatherman to hire Mr. Maples.

Q. Did you interview Mr. Maples?

A. Yes.

Q. Who told Mr. Maples he was hired?

A. I imagine the office.

Q. You were not the one to tell him that he was hired?

A. No, sir.

Q. On the matter of this procedure, is this procedure set up so that a clearance from the union can be obtained by the company?

A. It could be, you say?

Q. Yes, for employees for the job.

A. Would you rephrase that once more?

Q. Is this procedure set up on the hiring so that the employees can be cleared through the union?

A. Well, that would be through Mr. Wolcott. I wouldn't know [157] the——

Q. Is it your understanding with respect to the employees hired for this project that they are cleared through the union before they are put to work?

(Testimony of John E. Atkins.)

A. Well, I was under the impression——

Q. That was your understanding?

A. That was my impression.

Q. Well, that was your understanding——

Trial Examiner: Did you get an answer to that?

Mr. Yeates: That was my question.

Q. (By Mr. Yeates, continuing): ——was that your understanding of the procedure followed at Kings River Constructors?

A. I stated that was my impression of what the procedure was. I went to Mr. Weatherman. He, in turn, went to Mr. DeLay, and from there on I understood that things went through Mr. Wolcott. He is the labor coordinator.

Q. And that Mr. Wolcott cleared the employees through the union?

Mr. Smith: I will object on the ground that I think the direct examination brought out, and was limited in that sense, that Mr. Atkins had no dealings directly with the union and didn't know and had no occasion to know it.

Trial Examiner: I believe all he is being asked for is what his understanding of the procedure was. And what weight that would have I don't know.

Mr. Yeates: May he answer the question?

Trial Examiner: Yes.

The Witness: Would you repeat it?

(Last two questions and intervening answer on previous page read.)

Mr. Yeates: May he answer the question?

Trial Examiner: Yes.

(Testimony of John E. Atkins.)

The Witness: Would you repeat it?

(Last two questions and intervening answer re-read.)

Trial Examiner: The question was: Was that your understanding, that Mr. Wolcott would clear through the union before hiring an employee?

A. I would have to say again, that was my impression.

Q. (By Mr. Yeates): Were you interviewed by a field examiner for the National Labor Relations Board? A. Yes, sir.

Q. And at that interview—

Mr. Smith (interrupting): I am objecting to this because I don't think the direct examination covered these Board interviews, as such, and they are not even in the time that is in question.

Trial Examiner: I think on cross-examination, obviously, he is directing this question to the witness' credibility.

Mr. Smith: If this is to be impeachment, let's get at it.

Trial Examiner: He hasn't stated his purpose, but I [159] haven't seen anything improper in his questions yet. He may be refreshing his recollection, for all I know.

So proceed, Mr. Yeates.

Q. (By Mr. Yeates): Did you have an interview with Mr. Schneider from the Labor Board on or about May of 1957? A. I did.

Q. And where did that take place?

A. At Black Rock Camp.

(Testimony of John E. Atkins.)

Q. And did you read this statement that you gave to Mr. Schneider?

A. I believe he read it to me.

Q. You signed the statement?

A. Yes, I did.

Q. Under oath? A. That is right.

Q. Now, do you recall at that time whether or not you stated to Mr. Schneider this statement: "I know that F. Myers was cleared by the union, but it was a requirement between the company and the union that a man be cleared before he goes on the payroll. We cannot hire a man except that he goes through the union. And I was instructed to always contact Mr. Wolcott for any man I might need. Wolcott would take care of clearing the man through the union". Do you recall that statement?

A. I believe so.

Q. Did you make that statement to Mr. Schneider at that time? [160]

A. I believe I did.

Q. And at the time you made that statement, wasn't it your belief and did you not feel that this was a requirement and the procedure followed?

A. That was my impression at the time.

Q. In this statement you don't say that is your impression is that correct? A. That is right.

Q. You state: "But it is required between the company"—that they clear through the union. Now, at the time you gave that statement you didn't limit that to an impression. Isn't it true that this is the procedure that is followed?

(Testimony of John E. Atkins.)

A. I wouldn't know.

Q. This is the procedure that is followed with the men who have worked there as far as you know, is it not?

A. I wouldn't know. I wouldn't have the knowledge there.

Q. You gave this statement based on your experience working with Morrison-Knudsen and your experience with the company on this job, did you not?

A. I gave the statement assuming that that was the procedure.

Q. Because this is the procedure followed by the Kings River Constructors?

A. I wouldn't know that.

Q. That is, you have worked with the Morrison-Knudsen Company on these types of jobs and that is the procedure followed [161] by them on the hiring of their employees?

A. I wouldn't know.

Q. You discussed with Mr. Wolcott the fact that the men were cleared through the union?

Mr. Smith: I object to that. He has not testified to that.

Trial Examiner: Well, it is a question—

Mr. Yeates: I am asking a question.

Q. (By Mr. Yeates): Is that not correct?

A. I have discussed with Mr. Wolcott the hiring of men, if I needed them.

Trial Examiner: That does not answer the question exactly.

(Testimony of John E. Atkins.)

Do you want to get your question answered, Mr. Yeates?

Mr. Yeates: The question I asked was:

Q. (By Mr. Yeates): And, Mr. Atkins, this might not be the exact question because I can't remember—the procedure followed in this, to your understanding, it was followed in this way with respect to clearance for the employees?

A. I said I wouldn't know that.

Q. But at the time you gave this statement that was your understanding.

A. That was my impression, yes.

Q. Is it still your understanding that that was the procedure followed?

Trial Examiner: He has never testified as to his understanding, Mr. Yeates. He has held steadfastly to the word [162] "impression."

Q. (By Mr. Yeates): Well, you state this as your impression? A. That is right.

Q. And this impression was derived from instructions to you? A. No, sir.

Q. Was it derived from your previous work there and the manner that was used?

A. Just general conversation on the job.

Q. Between you and Mr. Wolcott?

A. No, sir. Between anyone that happened to come into the warehouse.

Q. You just generally discussed this with them?

A. Not generally discussed, but if it was brought up.

Q. And from them you got the impression that

(Testimony of John E. Atkins.)

this was the manner followed. Who are these people you say generally you discussed this with?

A. Well, there was hundreds of men that worked on the job.

Q. They told you that they had to be cleared before they came?

A. Not that they had to, no.

Q. But that was the procedure followed?

A. I wouldn't say that it was the procedure that they told me was followed, no.

Q. Where did you get this impression from? You got it from talking with men who stated that they had followed, or this is [163] the way they had cleared through the union?

A. From talking with men, that they were union members.

Q. And your statement, "But it is a requirement between the company and the union," now, you got that from talking with the men who came to work, that the company required that?

A. Well, that was the impression I had from these conversations.

Q. But you were never told by anyone from the company that that was a requirement?

A. No, sir.

Q. This impression came from the air that was present in these discussions with these other people?

A. That is right.

Q. Nothing had ever been told you in any way?

A. No, sir.

(Testimony of John E. Atkins.)

Q. What is your present position with Morrison-Knudsen? A. Warehouse manager.

Mr. Smith: I object on the basis of that he has testified to that, and it wasn't that; he isn't working for Morrison-Knudsen.

Mr. Yeates: He said he was working for Morrison——

The Witness: I am working for Macco-Morrison-Knudsen.

Mr. Yeates: If I understood his testimony, he said he was on the Morrison-Knudsen payroll.

The Witness: I am on the joint venture's payroll. [164]

Q. (By Mr. Yeates): How long is this joint venture that you are on, whose payroll you are on, to last? A. I don't know.

Q. At the end of its time will you be again on Morrison-Knudsen's payroll?

A. I would imagine. I would not be sure.

Q. What is your age? A. Sixty-four.

Q. Does Morrison-Knudsen have a retirement policy? A. Yes, sir.

Q. For employees? A. Yes.

Q. At what age do they retire them?

A. At 68.

Q. At 68? A. Yes, sir.

Q. As far as you know at this time, are you entitled to retirement?

Mr. Smith: We will——

Trial Examiner: Are you objecting?

Mr. Smith: Yes. We are not inquiring about

(Testimony of John E. Atkins.)

Morrison-Knudsen. We are talking about Kings River Constructors, aren't we?

Mr. Yeates: This joint venture is not a corporation. It is a joint venture, is it not? [165]

Mr. Smith: It is a separate entity.

Mr. Yeates: It is a corporate entity? Is it a joint venture or a corporate entity?

Mr. Smith: Off the record, please.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Yeates: Strike the last question. I will ask the question this way:

Q. (By Mr. Yeates): In the event you should be entitled to retirement, to the best of your knowledge, what company is it that would pay your retirement?

A. I would imagine Morrison & Knudsen Company.

Q. Do you know whether or not the retirement policy for Morrison-Knudsen would depend upon continued employment with them until your retirement age?

A. I believe it is, or in case of sickness.

Q. The first time you asked for Tuttle by name was when you realized that Mr. Sharp was to be transferred to Wishon?

A. Yes, sir.

Q. And you at that time requested him by name to Mr. Weatherman?

A. That is right. I believe that I asked Mr. Sharp to have Mr. Tuttle get in touch with me.

(Testimony of John E. Atkins.)

And then I told Mr. Weatherman that if Mr. Tuttle was available I would like to have him. [166]

Q. And that was late in February, if I recall?

A. That would be around, oh, the 19th or 20th, somewhere around in there.

Q. According to your understanding of procedures from that time on, why, Mr. Weatherman would request the project supervisor to get Mr. Tuttle? A. That is right.

Q. And then it would ultimately go through Mr. Wolcott? A. I would imagine so.

Trial Examiner: Well, you have more than imagination on that, don't you, Mr. Atkins? You know that it would go through Mr. Wolcott, don't you?

The Witness: Yes; he is the labor coordinator.

Q. (By Mr. Yeates): And that is the procedure followed on employees coming in to your job?

A. That is right.

Q. On Mr. Myers, was the procedure followed with him? A. Yes, sir.

Q. And was he cleared by the union prior to his coming to work for you?

A. I wouldn't know. That would have to come through Mr. Weatherman.

Q. I will again refer to your affidavit that you gave to Mr. Schneider. In that affidavit you state: "I know that Myers was cleared by the union." Now—— [167]

A. Well, from Mr. Myers' conversation—he said he had been cleared.

(Testimony of John E. Atkins.)

Q. Was this your impression or a statement that Mr. Myers gave to you?

A. Mr. Myers told me that he had been cleared through the union.

Q. When Mr. Myers left, that was before the time that Mr. Maples was terminated?

A. That is right.

Q. You again asked for another warehouseman to fill that position?

A. That is right.

Q. And that was whom?

A. Mr. Ryan.

Q. Did you request him by name?

A. I did.

Q. And to whom did you request him?

A. The first request had been put through the district office, to see if he was available.

Q. And that was in Los Angeles?

A. That is right.

Trial Examiner: This is Myers we are talking about now?

The Witness: No. This is Mr. Ryan.

Mr. Yeates: Ryan.

Trial Examiner: Did you request Myers? [168]

The Witness: No, I did not request him. I just requested a man.

Trial Examiner: Well, you requested Mr. Tuttle, didn't you?

The Witness: At one time, yes, sir.

Trial Examiner: Well, at the time you got Myers you had requested Tuttle, is that right or not?

(Testimony of John E. Atkins.)

The Witness: No. Not at the time I got Mr. Myers.

Q. (By Mr. Yeates): Prior to the time you got Mr. Myers?

A. I had requested, along in February, February 19th or 20th, I had requested Mr. Tuttle.

Q. Was Mr. Ryan cleared through the union, too?

A. I would imagine, yes, I would imagine so.

Q. That would be your impression, or there again had you——

A. He has always carried a union card.

Q. But the clearance you were speaking of with Myers was through Local 431, is that correct, through Mr. Fudge?

A. The information from Mr. Myers was that he had been cleared through the union.

Q. Through Local 431?

A. I don't know the number.

Q. What was the union you were dealing with in that area?

A. Well, for warehousemen, the Teamsters Union.

Q. That was Mr. Fudge, Local 431?

A. That is right. [169]

Q. You heard the testimony of Mr. Sharp that Mr. Perkins had told you that you were to release Sharp, that he was going back to the Wishon job. Do you recall that conversation?

A. No, sir, I do not.

Q. That conversation never took place?

(Testimony of John E. Atkins.)

A. Not that I can remember, no, sir.

Q. Could it have taken place?

A. I don't believe so.

Q. Did Mr. Perkins ever come to the warehouse, the Black Rock project warehouse?

A. He has been down in the district, but actually to come to the warehouse for something, no.

Q. He has never been there?

A. I wouldn't say he has never been there. I think that he came through there and looked the warehouse over.

Q. The determination to eliminate the shift was made when Mr. Wells came in as district manager?

A. That is right.

Q. And that, as I recall, was about the same time that Maples left?

A. That is right. The next day after Mr. Maples left.

Q. Up until that time, as far as you knew, you were going to operate on the three shifts?

A. That is right. [170]

Mr. Yeates: That is all.

Trial Examiner: Mr. Atkins, who took Mr. Sharp's place?

The Witness: Mr. Sharp's place when he left?

Trial Examiner: Yes.

The Witness: Mr. Maples stepped up and took his place.

Trial Examiner: Just when did Myers come into the picture? We have been over this, but I am still not too clear.

(Testimony of John E. Atkins.)

The Witness: Mr. Myers came in about the time that Mr. Sharp left.

Mr. Yeates: Mr. Maples took Mr. Sharp's place and Mr. Myers took the place that Mr. Maples had had?

The Witness: That is right. And Weatherman was on swing shift, or I mean graveyard.

Trial Examiner: I believe you testified that when Tuttle actually showed up for the job this first time the job had been filled?

The Witness: That is right, yes.

Trial Examiner: That was your testimony?

The Witness: That is right.

Trial Examiner: It had been filled by whom?

The Witness: Mr. Myers.

Trial Examiner: Had you made any request for Mr. Myers?

The Witness: Not by name, no, sir.

Trial Examiner: Well, had you made any——?

The Witness: I had made a request for a warehouseman, yes.

Trial Examiner: Without naming anybody?

The Witness: At that time.

Trial Examiner: You hadn't named Tuttle at the time Myers was hired?

The Witness: This was in the first part, or the middle part, of February?

Trial Examiner: This is the first——

The Witness: The first contact, I had asked for Mr. Tuttle, had asked Mr. Sharp to contact Mr. Tuttle.

(Testimony of John E. Atkins.)

Trial Examiner: Had you sent Tuttle's name in?

The Witness: Just to Mr. Weatherman.

Trial Examiner: Was this before Myers or after Myers had been hired?

The Witness: I believe that it was at the time. The office also knew that Mr. Sharp was leaving, and before Mr. Tuttle arrived at the job to see me, because I had asked Mr. Sharp to have him contact me, I had been informed that Mr. Myers was hired for the job.

Trial Examiner: You actually had nothing to do with Mr. Myers' hiring?

The Witness: No, sir.

Trial Examiner: Do you have anything further, Mr. Smith?

Mr. Smith: Yes, we do. [172]

Redirect Examination

Q. (By Mr. Smith): How long have you been carrying a union card, Mr. Atkins?

A. I do not carry a union card.

Q. Have you ever been a member of the union?

A. No, sir.

Q. When the investigator for the Board, Mr. Schneider, visited you and talked with you concerning Mr. Tuttle, did you dictate this statement?

A. No. I was talking to him and he was writing it down.

Q. I see. And you stated that you didn't read it over, you believed he read it to you?

A. He read it to me.

(Testimony of John E. Atkins.)

Q. Did you want to sign that statement? Did you voluntarily sign it?

A. I did not. I informed him, I — he said, "Would you swear to and sign this?" and I said, "I would rather not sign it." And he said, "Well, you are eventually going to have to sign one."

Q. He said that to you? A. Yes, sir.

Q. He said, "You are eventually going to have to sign"? A. Words to that effect.

Q. Did he make you raise your hand and swear you to an oath?

A. I believe he did, yes, sir, after he had informed me that—— [173]

Q. Do you know what an affidavit is?

A. Well, an affidavit, my impression of it would be that it was the swearing to the truth of your impressions or your thoughts.

Q. I see. Did you make these statements there—I think you have testified that they are statements of impressions, not especially statements of fact?

A. That is right.

Q. Are you in any position to know the statement of fact on these various items?

A. No, sir, I have no contact——

Q. Have you ever entered into bargaining sessions with any union? A. No, sir.

Q. Have you signed a union agreement on behalf of the Kings River Constructors?

A. No, sir.

Q. Or any other employer?

A. I would have no authority to do that.

(Testimony of John E. Atkins.)

Q. Have you ever seen a union agreement?

A. No, sir.

Q. Do you know what requirements exist between the company and the union?

A. I do not.

Q. You don't know what agreements exist between the company [174] and the union?

A. No, sir. Nor between the company and the people they are working for.

Q. Do warehouse managers generally see such things? A. No, sir.

Q. Are you concerned with such things?

A. No, sir.

Mr. Smith: That is all.

Trial Examiner: Mr. Atkins, did you tell Mr. Tuttle he would have to clear with the union?

The Witness: No, sir.

Trial Examiner: Did you tell him anything like that, make any statement to him along that line?

The Witness: I don't believe I did, no, sir, because there was no position open at the time, at either time that he came in.

Trial Examiner: I meant either time.

The Witness: No. There was no position open either time he contacted me.

Trial Examiner: I think he has testified to the effect that the second time he met with you you made some statement to the effect that he would have to clear with the union or should clear with the union. Would you say you did or didn't?

The Witness: No, sir. I think that he informed

(Testimony of John E. Atkins.)

me then that he was having trouble with the union.

Trial Examiner: What did you say? That is what I am particularly interested in now.

Trial Examiner: I believe I informed him that I had no jurisdiction past putting in for his employment.

Trial Examiner: Do you have anything further, Mr. Yeates?

Recross Examination

Q. (By Mr. Yeates): At the time you talked with Mr. Tuttle it was your impression that warehousemen had to clear through the union, though? And I am using your term, "impression."

A. That was my impression.

Q. And if you would have made a statement to him in that regard, it would have been in line with your impression, as a requirement for clearance?

A. I don't think the occasion arose——

Mr. Smith: I object to that question. Counsel states if he would have. Conjecture.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Yeates): At the time you talked to Mr. Tuttle this was your impression of the procedure followed, which was stated in your affidavit that you gave to Mr. Schneider?

A. That would be my impression, yes.

Q. And at the time you gave this statement, do you recall whether or not you were asked to initial each page? A. I could have been.

Q. And to initial any corrections that appeared in the body [176] of the affidavit?

(Testimony of John E. Atkins.)

A. Just offhand, I couldn't say.

Q. If I were to show you the statement that you gave Mr. Schneider—

Mr. Smith (interrupting): Are you going to admit this in evidence now?

Mr. Yeates: If you want it in evidence, I will put it in evidence.

Mr. Smith: I don't want it in evidence.

Mr. Yeates: If you want, we will have it marked for identification and have it put in evidence. I am going to ask him a question—

Mr. Smith: All right.

Q. (By Mr. Yeates): Is this your initial appearing on the affidavit? A. That is right.

Q. And on each page, at the bottom there, can you state whether or not that is your initial on the bottom of each page? A. I believe it is.

Q. And that is your signature on the last page?

A. That is right.

Q. Have you ever taken an oath before, Mr. Atkins? A. Yes, sir.

Q. And you understand the nature of an oath?

A. I do.

Mr. Yeates: That is all.

Trial Examiner: Mr. Atkins, in the position you held at that time on this project, just exactly what was your authority with respect to hiring warehouse personnel?

The Witness: I put in a request to the office, because I was working under the office manager, for

(Testimony of John E. Atkins.)

different men that I would like to have working for me in my warehouse.

Trial Examiner: You could do it, and was it your custom to do it?

The Witness: Yes, it was.

Trial Examiner: And what was your custom, to request a man to fill a job or to request John Doe, so to speak, to fill the job?

The Witness: Well, if I knew of some man that had worked for me, I most generally requested him by name if I possibly could, if he was available.

Trial Examiner: What was the practice with respect to your recommendations? In other words, were your recommendations normally honored or were they normally not honored?

The Witness: I would say it was about fifty-fifty.

Trial Examiner: You didn't have your way all the time?

The Witness: No, sir. After all, I have men above me yet.

Trial Examiner: Do you have anything further?

Mr. Smith: I have one question.

Trial Examiner: I am not entirely certain that we have developed his capacity for knowledge with respect to these things as much as it should be. Whether you want to ask any more questions or not—

Mr. Smith: He doesn't know the whole hiring procedure.

(Testimony of John E. Atkins.)

Mr. Yeates: Would the Trial Examiner like me to go more into his supervisory status?

Trial Examiner: I think you have gone into supervisory, but actually what extent he comes into contact with actual hiring practices, it is possible that might be developed a little further. I don't know. Maybe you have done all you can on that.

Further Redirect Examination

Q. (By Mr. Smith): Mr. Atkins, did you request Mr. Weatherman, the office manager, to employ Mr. C. L. Weatherman, the warehouseman?

A. No, sir, I did not.

Q. As a matter of fact, did you want Mr. C. L. Weatherman on your job? A. I did not.

Q. You got him? A. That is right.

Further Recross Examination

Q. (By Mr. Yeates): Is he not a relative of one of your [179] supervisors?

A. He was a relative of the office manager.

Mr. Yeates: Enough said. We are talking about ordinary supervisory authority.

Trial Examiner: I think perhaps the matter has been gone into pretty thoroughly now, unless you have something further.

Is there anything further?

Mr. Smith: I think that is about it.

Trial Examiner: You are excused, Mr. Atkins. Thank you.

(Witness excused.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

We will recess until tomorrow morning at 10 o'clock.

(Whereupon, at 5:05 o'clock, p.m., Monday, February 24, 1958, the hearing in the above-entitled matter was recessed, to be reconvened tomorrow, Tuesday, February 25, 1958, at 10:00 o'clock, a.m.) [180]

Proceedings

Trial Examiner: We will be in order.

Mr. Smith: I would like to call Mr. James Wolcott.

JAMES THOMAS WOLCOTT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Smith): Would you state your name and address?

A. James Thomas Wolcott, 208 Louisa, Boise, Idaho.

Q. Will you give us your present occupation, Mr. Wolcott? A. Labor coordinator.

Q. For what employer?

A. Morrison-Knudsen Company.

Q. Would you describe your past experience and educational background?

A. I graduated from high school in 1942. In

(Testimony of James Thomas Wolcott.)

August 1942 I was hired by Morrison-Knudsen Company for the PNAB project at Red Hill in Honolulu, Hawaii. I worked over there for 14 months in various jobs as a laborer, crusher man, patch plant operator, mechanic and shift mechanic. I returned to Boise October 1943 and then after getting out of the service April '46 I went to work at the terminal ice plant in Nampa, Idaho, for Morrison-Knudsen, worked until September, at which time I quit—I worked there on that job as a carpenter helper—and then I quit in September and went to the College of Idaho, [184] graduated there with a BA degree in economics in August 1949. I worked all of these summers while I was at the College of Idaho, I worked for Morrison-Knudsen Company in the paving division as an oiler and crusher man. In September 1951 I enrolled at Stanford University Graduate School of Business, graduated from there with a master's degree in April 1951. I was then hired by Morrison-Knudsen Company in Boise as an accountant, later worked as special assistant to the controller analyst, was then hired as a labor coordinator for Morrison-Walsh-Perini in August 1955, and I have been in and out of Boise since then, and back here for Kings River Constructors and Morrison-Walsh-Perini in November 1956.

Q. During the time in question, of this case, from approximately January 1957 through April 1957, what position did you hold?

(Testimony of James Thomas Wolcott.)

A. I was labor coordinator for Kings River Constructors and Morrison-Walsh-Perini.

Q. Did you in your educational experience major or put special emphasis on any particular field in business?

A. My BA degree was in economics, but the subjects were, as much as I could get, at least, of labor relations. At Stanford they won't let you major in any one particular field as far as getting a degree in that field, but you do take elective courses, of which I selected primarily industrial relations, industrial management, personnel, related subjects.

Q. In connection with your duties as labor coordinator for Kings River Constructors and Morrison-Walsh-Perini during the period January 1957 to April 1957, or during the whole, entire period you were employed in this position, which of those concerns or what concern were you on the payroll of?

A. Which assignment do you mean, now?

Q. Well, I mean in this position as labor coordinator for Morrison-Walsh-Perini and Kings River Constructors, from which joint venture or which company did you receive your pay check?

A. I was paid by Morrison-Walsh-Perini, on their paycheck.

Q. On their paycheck? A. Yes.

Q. Did you receive—you received no paychecks from Kings River Constructors at that time?

A. No.

Q. Are you acquainted with the procedure for

(Testimony of James Thomas Wolcott.)

the payment of your services between the two joint ventures?

A. There was an invoicing — Morrison-Walsh-Perini would invoice Kings River Constructors for a portion of my salary.

Q. What were your duties in connection with your position as labor coordinator?

A. Well, as the title implies, I would coordinate the work forces, the hiring, assist the job management in lining out their crews and men according to the classifications that they wanted when they wanted them and tried to select people, [186] specific people to fill specific jobs, interviewed job applicants, got their qualifications, background and so forth. I handled grievances, any grievances on the job, assisted job management in the settlement of any jurisdictional disputes, helped interpret labor agreements to employees and to job management, interviewed many of the new men on the job, as they came and left the job, and general labor relations.

Q. Mr. Wolcott, would you describe the employment process of Kings River Constructors during this period?

A. Well, we obtained men both locally and from all over the country. Some of these people we knew beforehand and made arrangements beforehand to be employed, in which case I may or may not have interviewed them before they went to work. I had an office in Fresno at 1825 Merced Street at which

(Testimony of James Thomas Wolcott.)

I interviewed any job applicants, got their qualifications, and so forth.

On hiring a man, I dealt directly with project management. We worked out the needs together. I was responsible to project management. We worked out the needs and I procured the men for them.

Q. Did you process for employment all applicants or all employees with Kings River Constructors?

A. I referred them to the job. They would be interviewed by me and I referred them to the job. The hiring and the placing on the payroll was done there. Other men were obtained [187] through the various local unions as we needed them, depending upon the skills that were needed and the qualifications and the particular problem at the particular time.

Q. If, for example, the project manager at Kings River Constructors had need of two warehousemen, five cat operators, would he advise you directly?

A. He would.

Q. Or would—— A. He would advise me.

Q. And you would seek to fill those positions?

A. That is correct.

Q. Would you on your own at any time refer men to the project if you personally knew of job openings or if you knew of no job openings?

A. I certainly wouldn't send a man to the job if we had no job opening. If we had job openings, yes.

(Testimony of James Thomas Wolcott.)

Q. How would you be advised of job openings?

A. By the project manager. He would phone me at Fresno. We kept an office at Fresno for the reason we were remote—I mean the job itself was remote, back in the mountains—and we had to have some central place where people could come and apply for jobs, and the labor relations.

Q. Just how remote was the job from Fresno?

A. Which job?

Q. Well, Kings River Constructors. [188]

A. The power house job was approximately, oh, 60 miles northeast of Fresno, on the north fork of the Kings River. It's about a two-and-a-half hour drive from Fresno.

Q. Why did you choose to have your employment office in Fresno?

A. Well, it gave us more opportunity to interview and talk with people that wanted to apply for jobs. And also, of course, I had a large number of dealings with the various union representatives. Some of that was accomplished in Fresno, some of it on the job.

Q. Is Fresno the closest city of any size——?

A. Oh, yes.

Q. Or labor market? A. Yes, definitely.

Q. Mr. Wolcott, in the course of your duties as labor coordinator did you become acquainted with or do you know Mr. M. E. Tuttle, the charging party?

A. Yes, I know Mr. Tuttle. I have met him.

(Testimony of James Thomas Wolcott.)

Q. Would you state when and under what circumstances you first met Mr. Tuttle?

A. He came into my office on February 26th. But prior——

Q. In what year?

A. 1957. Prior to that time my secretary had left a note saying that Mr. Tuttle had come into the office, had told her that Bert Perkins would tell me that Mr. Tuttle was to be [189] hired at the Haas power house.

Q. When prior to the 26th of February?

A. Day before, the 25th.

Q. Do you recall——

A. She said that he had been in there the day before.

Q. Do you recall——

A. I didn't talk to him the day before. I talked to him on the 26th.

Q. Do you recall which day that was?

A. I think that was on a Tuesday.

Q. That you talked to him?

A. Talked to Mr. Tuttle?

Q. Yes. A. Yes.

Q. Would you describe that meeting and conversation with Mr. Tuttle and what took place?

A. Mr. Tuttle came in and said that he had come from Tri-Dam, that he wanted to go to work, and that he wanted to go to work right now. I told Mr. Tuttle that I had no orders for men right then. He answered that by saying that, something to the effect that "Now, you know I am having

(Testimony of James Thomas Wolcott.)

trouble with the union here." And I told him, I said, "Mr. Tuttle, that makes no difference to me. Any dealings between you and your union, if any, is just that. And if at such time we have a job for you, we will contact you about that job. I am not concerned [190] about any relationships you may have outside. My job is to get qualified men."

Q. Did you have a job opening in the warehouse at that time? A. No, I didn't.

Q. Would you have known if there was a job opening in the warehouse?

A. I would have been contacted by project management if there was a job opening.

Q. Did you have other people come in and see you, claiming that they had been promised employment?

A. Yes. It was very common. I have had people referred to me by, or claim that they were referred to me by, various executives of the company. I have had people tell me that I had better hire them or they would contact certain representatives of the company and that I would be on the spot. There are all sorts of implications. I have had quite a number of people come in that way.

Q. How do you handle these cases?

A. My reaction was that I could not fill a job that I did not have. I don't send project management any certain number of men. They request a certain number of men of me in certain categories. And part of my job is to see that we do not become overstaffed, that we have only the

(Testimony of James Thomas Wolcott.)

people that the job wants. If they say, "Get eight men in a certain category", I get them eight. I don't get them seven or ten. That was a major portion [191] of my job.

Q. If a man were seeking a position such as Mr. Tuttle was seeking, would you, or did you in Mr. Tuttle's case, advise him that no job was available but for him to go up to the job and maybe he could get a job, land a position?

A. I told him that there was nothing available. I didn't tell him to go to the job or anywhere else. I told him I had nothing for him at the time. I asked him to leave his phone number and address, which he did. I told him I would contact him if and when we had a job for him.

Q. In such cases do you ask or suggest that where you have no order for men they inquire at the project site?

A. No. My job was to interview the men.

Q. After the 26th of February when did you next see or talk to Mr. Tuttle?

A. Mr. Tuttle was in two or three times in March. He was in, I would say, about the middle of March and late in March.

Q. This is in 1957, is that correct?

A. In 1957.

Q. Where did these conversations take place?

A. In the Fresno office again.

Q. In the Fresno office? A. Yes.

Q. Would you describe those meetings and conversations?

(Testimony of James Thomas Wolcott.)

A. Mr. Tuttle came in again, saying that he was having some [192] union difficulty. I told him again that I had no interest in that, that if we had a job for him, if he was still looking for work and still available, why, we still had his phone number and his address on file, he would be contacted at such time as an opening developed for him.

Q. Then did you see or talk to Mr. Tuttle on any occasion after that?

A. I called Mr. Tuttle on my mobile telephone on April the 4th, the evening of April the 4th.

Q. You say your mobile telephone. Would you state where you were at the time you made the call?

A. I was up at Black Rock.

Q. And this mobile phone, where is it located?

A. It is in the car that I have.

Q. Where did you call Mr. Tuttle?

A. I believe I placed the call first to Friant, California, at a number he had left. He was not there, as I recall. They gave me a phone number in Fresno, a Clinton phone number, and I phoned him there the night of the 4th.

Q. And you told him at that time—would you describe your conversation again with Mr. Tuttle at that time?

A. I told him that a man by the name of Maples was apparently going to quit at the power house, that he had said he was getting married and was leaving. I told Mr. Tuttle that there was an opening coming up there for which we had him in mind

(Testimony of James Thomas Wolcott.)

[193] and that I would call him again and let him know exactly what day. I told him it would be the 12th or the 13th and he would be contacted and told when to report. I called him again on the same subject the next morning. I wasn't sure whether he could hear too well. I wasn't in too good a place to telephone from. You have to be in certain locations to get clear reception on those mobile telephones.

Q. The next morning did you call him from the mobile telephone?

A. No. I called him from Fresno the next morning, the 5th.

Q. At the Fresno number?

A. Yes, I believe it was the Fresno number.

Q. And what did you tell him at that time?

A. I told him again, I repeated what I told him the night before. And he mentioned again the union, or some problem that he was having with the union. I told him again that when Mr. Maples left, I again did not care about any connection he might or might not have with the union, my only interest was this job, and that he would be contacted, we needed him the 12th or the 13th.

Q. When you say you didn't care what troubles he was having with the union, had the job been opened and you had offered it to Mr. Tuttle and the union refused to clear him, what would you have done?

A. I never asked the union for him, but I would have put him [194] to work anyway.

(Testimony of James Thomas Wolcott.)

Q. Did you at any time advise Mr. Tuttle that it would be necessary for him to clear with the union? A. I did not.

Q. Or obtain clearance from the union in order to work as a warehouseman?

A. I did not, no.

Q. Mr. Wolcott, did you at any time participate in any meetings with the representatives of Teamsters Local No. 431?

A. Yes. I participated in several meetings with them.

Q. Would you state your recollection of these meetings?

A. Well, the first meeting that I recall at which Teamsters 431 was represented was our pre-job conference for Kings River Constructors, just after the work had started on that project.

Q. When was that?

A. The meeting was held the first or second day of November 1956, November 2nd, 1956.

Q. Where was this meeting held?

A. In Fresno, the Fresno Hotel.

Q. Would you state as best you remember who was present or who was represented there?

A. Teamster representatives?

Q. Well, let me put it this way: Would you state what unions, if any, were represented and what representatives of Kings River Constructors were at that meeting? [195]

A. Well, there were several craft unions represented, the Laborers, the Teamsters, the Operating

(Testimony of James Thomas Wolcott.)

Engineers, the Electricians, Plumbers and Pipefitters. I believe that is the basic ones.

Q. Do you recall who were the Teamster representatives at the meeting?

A. Al Fudge was there. I believe that Walt Biggers was. I know Al was.

Q. And what was the purpose of this pre-job conference—was that what you called it?

A. Yes.

Q. What was the purpose of it?

A. The purpose of that is to discuss with union officials the ways in which we would be employing our men, ways in which we expected to work with them in employing men, the qualifications of people we might be needing, the various numbers, to give them an idea of what we expected to bring in in the way of a number of people from outside sources, what we might be needing from them, to discuss the hours of work on the project, the living conditions, the meal charges, to give them an opportunity to present jurisdictional problems if they wished, to review particularly any questions that might have to do with that project, which we outlined to them, what we expected to do, how long it would take, and so forth.

Q. Was your status or position discussed at this meeting? [196]

A. Yes; Mr. Knack introduced me as the resident labor coordinator for this work and said that I would be handling labor relations in conjunction with project management.

(Testimony of James Thomas Wolcott.)

Q. Mr. Wolcott, was there in effect any agreement, understanding or arrangement with the Teamsters Union wherein it was required that anyone be cleared by the union or referred by the union before being hired by the Kings River Constructors? A. No.

Mr. Smith: Your witness.

Cross Examination

Q. (By Mr. Yeates): Repeat your conversation, Mr. Wolcott, with Mr. Tuttle on your first contact.

A. My first contact with Mr. Tuttle was when he came into the office, told me that he had come down from Tri-Dam, wanted to go to work as a warehouseman.

Q. And what was your reply?

A. I told him that at that time I had nothing for him, that I would like to get his name and address. I asked him a little bit, as I recall, about his work, where he had worked and how long.

Q. What other conversation did you have at that time, if any? A. With whom?

Q. Mr. Tuttle.

A. He told me about having some trouble with the union in [197] Fresno.

Q. What did you say to him?

A. I told him that I was not interested in union problems, that that was between him and the union.

Q. And that concluded your conversation with him?

(Testimony of James Thomas Wolcott.)

A. That's all that I recall of it. It was very brief.

Q. You remember those words that you state, though; you remember that part of the conversation?

A. Which part?

Q. The part that you have restated here.

A. Yes.

Q. This was at your office?

A. Yes, my office in Fresno.

Q. This was your first contact with Mr. Tuttle?

A. Yes.

Q. In fact, wasn't your first contact with Mr. Tuttle at the project when you saw him by the automobile?

A. I have absolutely no recollection of meeting him at the project at any time.

Q. On the day in question when Mr. Tuttle was up seeing Mr. Atkins, which would be on or about February 27th, you did not see Mr. Tuttle on that day?

A. I do not recall at all seeing Mr. Tuttle on the project. The first recollection I have of seeing Mr. Tuttle is in the Fresno office. [198]

Q. Could it be possible that you did see him at the project on that day?

A. I can say that I have no recollection of it. And I am quite sure that I did not. I state it as emphatically as I can that I have absolutely no recollection of ever meeting him on the project.

Q. Now, as a labor coordinator, would you, Mr. Wolcott—

(Testimony of James Thomas Wolcott.)

A. (Interrupting) Would you state the day again, please?

Q. It would be on or about February 27th.

A. No.

Q. Were you up at the project on that day?

A. No, I don't think that I was. I believe that I was in Fresno—it's awfully hard to remember, I have been back and forth a lot, but I believe that I was in Fresno up until about Wednesday of that week, which, I think, would have been the 27th, somewhere in there.

Q. As labor coordinator, one of your jobs is to keep and promote harmonious relations with the unions you are dealing with?

A. That is correct.

Q. And you were, of course, concerned with the elimination of work stoppages or anything else which might foul up the job? A. Certainly.

Q. And that is one reason for a pre-job conference? [199]

A. That is correct. Some things can be ironed out ahead of time.

Q. Now, on your pre-job conference were arrangements made with Mr. Fudge for you to be the party designated for hiring employees from, or concerned with, Local 431?

A. Yes. People we obtained from his local, he was the man we would deal with.

Q. So the relationship would be with Mr. Fudge and yourself? A. Primarily.

(Testimony of James Thomas Wolcott.)

Q. So that there would be no other of the company supervisors who would——?

A. We have dealt with other people in his local, but primarily with Al Fudge.

Q. And in this pre-job conference was the matter of clearances discussed?

A. The matter of men was. Our manpower needs and that sort of thing.

Q. Was the matter of clearances discussed? Answer yes or no.

A. One craft made the statement that they would like to have their——

Q. This was from Mr. Fudge, now?

A. There was no discussion with Mr. Fudge, no—you are talking about the November 2nd pre-job conference?

Q. Yes.

A. There was no discussion with him whatever on that. Are you talking procedure or men? [200]

Q. I am talking about clearance of men.

A. No.

Q. And an oral arrangement with Mr. Fudge was never made at this pre-job conference in that regard?

A. I told him, it was said, at the meeting we would contact him, we would try to deal with him for the men that we wanted him to obtain for us, that we didn't want men in excess of what we required and that sort of thing, and that I would be the man who would be requesting the men.

Trial Examiner: Was there any understanding

(Testimony of James Thomas Wolcott.)

reached between you and Mr. Fudge that you would hire no men in the capacities over which he had jurisdiction without calling him.

The Witness: No. There was no such discussion with Mr. Fudge.

Trial Examiner: You had no exclusive hiring arrangement with him?

The Witness: No, we did not.

Q. (By Mr. Yeates): And if a man were hired without clearance from Fudge, did you then report it to Fudge for clearance on that gentleman?

A. There were men hired on the job by project managers. Now, he would later, on occasion, contact some of those people on the job.

Q. But the question I asked you, if a person was hired who had not been cleared through the union, was the union then [201] contacted and informed of this man being hired and a clearance obtained for him?

A. They were sometimes informed that a certain man had been hired or they would contact him on the job.

Q. Do you recall whether Mr. Myers——

A. (Interrupting) But I don't know whether such individuals were later cleared by Mr. Fudge or not.

Q. Was Mr. Myers cleared by the union before coming to work?

A. Mr. Myers was furnished us in response to a requisition from the Fresno local.

(Testimony of James Thomas Wolcott.)

Q. Well, was he cleared by the local before he came to work for you?

A. I didn't see his clearance. I don't know. He was hired.

Q. Was Mr. Ryan cleared by the union before he reported to your job?

A. I believe Mr. Ryan's circumstances, as I recall it, were this: I was contacted by the job that he was on the way, was coming down to go to work. I advised Mr. Fudge of that, told him that if he showed up down there at the hall to go on to the job, but first to stop and see me so I could direct him to the job, but that he would then go onto the job. In other words, I told Fudge that he was a man whom either project management or district management had already made arrangements on and he was ready to go to work. [202]

Q. Was Mr. Ryan cleared to go to the job?

Trial Examiner: You mean cleared by Fudge?

Q. (By Mr. Yeates): Cleared by the union.

A. I don't know. I don't know that.

Q. Was Mr. Myers cleared by the union before he reported for work?

A. I would assume definitely that Mr. Myers was. I had requested——

Q. I am asking you yes or no.

A. I do not know. I have not seen his clearance, if there is one.

Q. Is your answer "I don't know"?

A. My answer has to be I don't know.

(Testimony of James Thomas Wolcott.)

Q. That is what I wanted, yes or no, I don't know.

Were you on or about the 17th of May interviewed by a representative of the National Labor Relations Board? A. Yes, I was.

Q. Do you recall who that man was?

A. Mr. Albert Schneider.

Q. Where did this interview take place?

A. At my office in Fresno.

Q. Did Mr. Schneider transcribe matters you gave to him in that interview?

A. He took notes.

Q. And did you after these notes were taken have occasion to [203] look over the written statement? A. He showed it to me.

Q. Did you read it over?

A. I read it, yes.

Q. And at the time you gave that statement was it correct, as far as you knew?

A. I told Mr. Schneider there were some things in there that I did not agree with. He told me that if anytime I wanted to make corrections, why, that would be fine.

Q. Now, in this statement you made to Mr. Schneider, there are corrections appearing in here. Were these corrections not made at your request?

Mr. Smith: Again I object to the question, on the basis that Mr. Wolcott has not testified that he made a statement to Mr. Schneider.

Mr. Yeates: I believe the testimony shows that

(Testimony of James Thomas Wolcott.)

he read over the transcribed notes of Mr. Schneider.

The Witness: Are you referring to my unsigned statement?

Mr. Yeates: Yes.

Trial Examiner: As I understand the witness, I presume he was asked certain questions and the field examiner took certain notes in writing.

The Witness: That is correct.

Trial Examiner: And you were shown these notes?

The Witness: I was shown those notes. [204]

Trial Examiner: What is the question?

Q. (By Mr. Yeates): The question was: On the transcribed notes by the field examiner, were there not places where the corrections were made at your request?

A. I crossed off a few words and said, "Well, this is incorrect." And he said, "Well, if you have more corrections later, I will type this up and send it to you. If you want to correct it then, why"——

Q. But there are parts of this statement, sentences, crossed out at your request, or additions made? A. There may be.

Q. And on this statement you gave to Mr. Schneider, do you recall whether or not you made pencilled checks on the border of the statement?

A. As I recall, as I went through that there were certain, there were several things that I disagreed with, two or three of which I discussed, and he interrupted there once to say, "Well, I will type

(Testimony of James Thomas Wolcott.)

this up and send it back." I told him that I wanted to check some facts some more, to review my files and to get some of this straight in my mind.

Q. And you told him that you would prefer to have the matter seen by the company attorney before you signed it?

A. I told him that I wanted to discuss it with our company people, that there were certainly some things in there that I wanted to review some more.

Q. Before you signed it?

A. I didn't tell him I would sign it.

Q. Under oath?

A. I didn't tell him that I would sign it.

Q. You wanted to review these things before you signed it under oath?

A. I wanted to review.

Q. Well, answer "yes" or "no."

A. Yes.

Q. In this statement you gave, I will read you a—

Mr. Smith: I object to the referral of these notes as Mr. Wolcott's statement.

Mr. Yeates: How would you like them to be designated? How would you like me to call them, Mr. Smith? How would you like me to refer to them?

Mr. Smith: I would say, at the most, "the notes that the field examiner took."

Mr. Yeates: Very well.

Q. (By Mr. Yeates): On the notes the field examiner took of the conversation which you looked

(Testimony of James Thomas Wolcott.)

over, made the pencilled notes on the border, now, do you recall in that statement——

A. Pencilled notes on the border, I don't recall.

Q. Pencilled checks?

A. Yes, I think there were some checks on the border.

Q. Do you recall whether these were put here by you? [206]

A. I think I put one or two in there.

Q. Now, on these notes of the field examiner, do you recall a statement made: "In fact, Mr. Myers on February 28th, 1957, reported for work as *warehouse*. He was cleared through the Teamsters Union at Fresno"?

Mr. Smith: I am going to object to the reading from these notes as hearsay. I think Mr. Wolcott has not been presented these notes for personal inspection. He has not signed them. They do not constitute a signed statement. Mr. Schneider has not been called here as a witness to relate his conversation. I think it is hearsay.

Trial Examiner: Well, he is not offering the notes. As I understand, he is using them as a method of refreshing the witness' recollection.

Mr. Smith: May I ask that the witness be permitted to examine the notes?

Trial Examiner: I don't suppose Mr. Yeates would have any objection to the witness examining them.

Mr. Yeates: I have no objection; if Mr. Smith

(Testimony of James Thomas Wolcott.)

wishes, I will have them identified and put in evidence.

Q. (By Mr. Yeates) I will point to the second page of the notes from the field examiner and ask you to read that and see——

A. Starting with "In fact"?

Q. Starting with "In fact." [207]

A. "In fact, Mr. F. Myers"——

Q. You don't have to read them out loud. Just read them and see if they were not in the notes at the time you looked them over.

A. Yes, I believe that was in the statement at the time.

Q. And this statement was given——

A. Those are not my words, however.

Q. Did you read the statement over, the notes over? A. Yes.

Q. And that was on or about the 17th of May?

A. Yes.

Q. Is it your testimony now that this statement here is incorrect?

A. Well, I have said that I assumed that Mr. Myers, if that is what you are referring to, had been cleared through the Fresno local since I called for a man from the Fresno local.

Mr. Yeates: Did you have an objection?

Mr. Smith: No.

Q. Is that your recollection now, at the present time, of what the matter was? A. Yes.

Q. And——?

(Testimony of James Thomas Wolcott.)

A. You mean as to what occurred or what is in there?

Q. As what occurred?

A. Yes, that is my recollection as to what occurred. [208]

Q. And not what is in the statement?

A. Right.

Q. Have you discussed the statement with Mr. Smith or the other representatives of the company?

A. Yes.

Q. Have they seen a copy of this statement?

A. Mr. Schneider furnished a copy. I haven't discussed that specific statement. I have discussed the affidavit.

Trial Examiner: Did you give an affidavit?

The Witness: Well, or the thing that was sent to us as an affidavit, but which is unsigned.

Trial Examiner: Well, it is not an affidavit, then.

Mr. Yeates: No.

The Witness: To answer your question further—

Trial Examiner: I just wanted to ascertain whether you had actually given an affidavit.

Mr. Yeates: Your attorney can bring that out when he is questioning you.

The Witness: All right.

Q. (By Mr. Yeates): Referring to the same statement, or notes, made by Mr. Schneider—I think it will probably be easier if I hand this over to you—I will call your attention to a pencilled notation in this first full paragraph of the third page

(Testimony of James Thomas Wolcott.)

what are the others, that don't refer to incorrect things? What are they for?

A. Things that I wanted to review for myself. I didn't know whether he was going to leave this statement with me or what he was going to do with it at the time he handed it to me. He told me it was normal procedure to sign an affidavit. I told him I would not sign it, because there were several referrals in there to other people, there were things in there that I didn't agree with. And he said, "Well, I will have this typed up and send you back a copy and if at any time you want to correct this, rewrite it, do anything with it," he said. "That is fine, he said." On that basis, I did not review it thoroughly. I made some of the checks, and so forth, that you see there.

Trial Examiner: Did he type it up and send it back to you?

The Witness: Yes, he did.

Q. (By Mr. Yeates): Now, the checkmarks, then, you stated you made here to the parts where you felt were incorrectly stated?

A. Some of them. Or things that I wanted to review in my mind and to look over thoroughly.

Q. A checkmark appears on the statement on page 4. "On [212] April 5, 1957, I again telephoned Mr. Tuttle and talked to him about the job, but he did not seem too interested." Was that checkmark put there because you were not sure that was a correct statement?

A. That was another thing I wanted to check.

(Testimony of James Thomas Wolcott.)

One of the things I could have added in there was a little bit more specificity as to what he meant or what I meant when I said he was not too interested in the job.

Q. And on the first page of the statement there is a checkmark on the phrase: "The incident involving Mr. Tuttle has reference to a warehouse job at Black Rock." Was that put there because you were not certain of that?

A. I did not agree at all with that statement. I did not say what the incident was. I did tell Mr. Schneider that we had Mr. Tuttle in mind for a job at Black Rock relative to this April the 4th telephone call. That is not my statement. That statement is not mine.

Q. "The incident involving Mr. Tuttle has reference to a warehouse job at Black Rock"?

A. I did not mention the incident. That was on the piece of paper when it came back, that Mr. Schneider handed to me and said, "Look it over."

Q. At that time it was in your mind that this did not refer to Black Rock?

A. I did not state what the incident was. [213] In fact, I specifically asked him.

Q. Just answer "yes" or "no."

A. I am trying to answer.

Q. Just answer "yes" or "no."

Trial Examiner: Do you understand the question he is asking you?

The Witness: Well, I have lost it now.

Mr. Yeates: All right.

(Testimony of James Thomas Wolcott.)

Q. (By Mr. Yeates): At the time of this statement was it your understanding or did you feel that this did not refer to the Black Rock project, concerning Mr. Tuttle?

A. Repeat that once more, please.

Q. Did you feel, or did you have a doubt that the matter we were concerned with referred to the Black Rock project?

A. Yes, I did have a doubt. I didn't know what matter he was concerned with.

Q. Did you feel that it——

A. I asked him and tried to find out.

Q. Did you feel it went to the Wishon project?

A. The only reason Black Rock got in there, so far as I know, is my own reference to the April 4th—I did not start off and tell him what incident he was talking about. I was trying to find out what the charges were and why, and he would not tell me. He gave me the general statement of what was in the complaint, but he would not pin it down to a specific [214] situation, specific jobs or specific times.

Q. So you feel that the statement: "The incident involving Mr. Tuttle has reference to a warehouse job at Black Rock" was incorrect?

A. As it is used there. Which page are you on?

Q. I am on the first page. Now, what would you say——?

A. Those were not my words and——

Q. Will you tell the Trial Examiner what would be your words on that matter?

(Testimony of James Thomas Wolcott.)

A. This whole thing would not be my words. I mean, this was written by another man, as a result of a conversation I had with him.

Q. Which you read over?

A. And one of the reasons I refused to sign it, and told him, that those were not my words.

Q. Did you ask for the paper to be returned to you?

A. He said he would type it up and return it. He said, "I will have to keep this one."

Q. But the paper——

A. He said he would have to keep this one.

Q. You were informed by Mr. Schneider that this was in reference to an investigation when you made this statement?

A. He told me that he was making——

Q. Answer my question "yes" or no."

A. Making a pre—— [215]

Q. Answer "yes" or "no."

A. Ask the question again, please.

Q. You were told by Mr. Schneider that this statement was being taken in conjunction with an investigation by the National Labor Relations Board?

A. Yes.

Q. On the bottom of page 3 there is a statement which has been inked out, continuing over to the first word on page 4. I will ask you to read that inked-out portion there, just to yourself. Wasn't that inked out at your request by Mr. Schneider?

A. Let me read the statement again. Yes, I believe it was.

(Testimony of James Thomas Wolcott.)

Q. So that the statement which appears there: "No man is put to work unless he obtains a clearance from the union," at your request, Mr. Schneider inked out?

A. I believe he either read that to me—I believe, as I recall, he started to read portions of this statement to me——

Q. You are not answering my question.

A. (Continuing): ——and said, "Is this correct?" And presumably he crossed it out then.

Q. You saw him ink it out?

A. I can't say that I saw him ink it out.

Q. Is this the check mark, yours, along the side?

A. He was writing this, he was sitting at a table away from me. I could not see what he had in front of him. [216]

Q. This statement here, did he ink this out of his own volition or is this a statement which you told him you did not feel was correct and you wanted it inked out?

A. I told him it was not correct. What he did with it after that, you had better ask him. He gave me that orally, as I recall it. I don't remember seeing that in the——

Q. Is this——

A. I don't remember seeing that not crossed out. I will put it that way.

Q. Is a checkmark appearing by that phrase which has been inked out on page 3? Do you recall putting that checkmark in there?

A. I think that is probably mine.

(Testimony of James Thomas Wolcott.)

Q. Did Mr. Schneider refuse to ink out any portions of this statement?

A. We didn't go over——

Q. Answer me "yes" or "no."

A. I can't recall any specifically that he refused to ink out.

Q. Did you feel that if you asked him to ink any of these out he would have refused, if you had asked him?

A. I don't know, I didn't know whether he would or not.

Q. But the statements that are appearing there in reference to Mr. Ryan, Mr. Myers and the last one I read to you concerning the normal procedure on employing are incorrect? [217]

A. You would have to review those as individual questions if you want me to give as complete an answer as I know how to give.

Q. The first one, in paragraph two, page 2, "Myers was cleared through the Teamsters Union of Fresno," is it your statement that that is now incorrect? Answer "yes" or "no."

A. I believe he was cleared through the Fresno local.

Q. Well, will you answer "yes" or "no"?

A. Can I answer, when I have never seen the reference slip that he would have——?

Q. I ask you whether this statement you have in the notes——

A. That statement was in the statement that he showed me.

(Testimony of James Thomas Wolcott.)

Q. Is the statement incorrect as it appears in the notes, to your recollection now?

A. I don't understand your question.

Q. I am asking you, is the statement: "He, Myers, was cleared through the Teamsters Union of Fresno"—and that is what appears in the notes taken by the field examiner—is it your testimony now that that is an incorrect statement?

Trial Examiner: Of what he said?

Mr. Yeates: Of what he said.

Q. (By Mr. Yeates): Of what you said to Mr. Schneider.

A. That he had been——?

Q. "He, Myers, was cleared through the Teamsters Union of Fresno." [218]

A. Those are not my words.

Q. Well, then, Mr. Wolcott, answer me "yes" or "no." To your recollection of it now, is that the statement you gave to Mr. Schneider.

A. That is the thought, yes.

Q. That is the thought?

A. That is the thought.

Q. Is the statement, itself, incorrect?

A. As to what I told him at the time?

Q. Yes.

A. I don't say that is incorrect, no.

Q. Could it be correct? A. It could be.

Q. All right. Now, on page 3, paragraph 1: "This man, Ryan, was cleared through the Teamsters Union of Fresno." Is it your testimony at this

(Testimony of James Thomas Wolcott.)

time that that is an incorrect notation of the statement you gave to Mr. Schneider?

A. There again, I believe that is the thought.

Q. Well, could it be correct, then?

A. You are talking strictly from what happened at the time this was prepared, I assume. Am I correct?

Q. I am stating: The statement as represented in the notes of Mr. Schneider, in reference to that matter, could that then be correct?

A. That could be correct. [219]

Q. All right. And on paragraph 3 of page 3, which you looked over: "In some cases employees are put to work before clearance. I then arrange for clearance with the union local at Fresno. Usually, before an employee reports to work, he first goes to the union and obtains a clearance slip." Now, the same question as to the other two, I again ask you with reference to this statement.

Trial Examiner: In other words, is that what he told the field examiner.

Q. (By Mr. Yeates): Is that statement appearing in those notes, is it your testimony at this time that that is incorrect—?

A. May I ask you one general question?

Q. First, let me ask you this question—

Mr. Smith: Let me interject at this juncture. I think it is getting somewhat argumentative, even for impeachment purposes. The witness has testified to each of these questions and to each of the statements that—I should say he has testified as

(Testimony of James Thomas Wolcott.)

to the subject matter of each of the statements that Mr. Yeates is referring to. Now, Mr. Yeates is referring to statements which are not in evidence here. And——

Mr. Yeates: Mr. Trial Examiner, if Mr. Smith likes, we will put these in evidence, if that is his objection to the matter?

Trial Examiner: Had you finished, Mr. Smith?

Mr. Smith: I want to point out that they are not in evidence. Mr. Wolcott is being cross examined, so to speak, as to matters that are not in, that were not asked him on his direct certainly.

Trial Examiner: Well, I think the line of inquiry is a proper one, if that is what you are getting at.

Mr. Smith: Is improper?

Trial Examiner: Is a proper one, as a test of the witness's credibility.

Mr. Smith: For impeachment purposes?

Trial Examiner: Yes. I think it is proper.

Something seems to be troubling the witness.

The Witness: I am bothered by the fact that here is a statement which a field examiner hit me cold with. I knew of the complaint, which I did not get an opportunity to review, thoroughly review, before——

Trial Examiner: Wait a minute.

Mr. Yeates: I think these are self-serving statements that he is making.

Trial Examiner: Just a minute. That is all a matter that your counsel can argue.

(Testimony of James Thomas Wolcott.)

The Witness: All right.

Trial Examiner: All that I think you are being asked for right now is did you make this statement to the field examiner. [221]

Isn't that what you are asking him, Mr. Yeates?

Mr. Yeates: Yes.

The Witness: I have tried to say, those are not my words.

Trial Examiner: Well, then you got down to this last statement. Will you reframe your question on the last statement and let's try to get it settled.

You are not being asked, as I understand it, at this time whether this is a true statement of fact. You are being asked did you say this to the field examiner.

That is what you are asking him, Mr. Yeates?

Mr. Yeates: I am asking him is it his testimony at this time that the statement which I have read to him from the notes of the field examiner and as he reports them is correct.

Trial Examiner: Incorrectly reported, you mean, by the field examiner?

Mr. Yeates: Incorrectly reported, that is right, incorrect, the statement that I have read to him—

Trial Examiner: Let's make this distinction. I think the witness is a bit confused. Are you asking him if that is a correct statement of fact or are you asking him—and this is a different proposition—"is this what you said to the field examiner?"

(Testimony of James Thomas Wolcott.)

Mr. Yeates: I am asking him if it is his testimony at [222] this time that the statement I have read to him from the field examiner's notes is an incorrect statement.

Trial Examiner: Of fact?

Mr. Yeates: Of fact.

The Witness: Yes, it is an incorrect statement of fact. And incidentally, this——

Trial Examiner: You will have to keep to the responses to the questions you are asked. And a witness does not volunteer. You are represented, of course, by able counsel.

The Witness: Thank you. I am sorry.

Trial Examiner: If the witness doesn't understand a question, he should always say he doesn't understand a question, of course.

The Witness: That, sir, was exactly my point at the time he brought it out, or you brought out the fact versus——

Trial Examiner: We don't want any witness confused, and I am sure Mr. Yeates is not intending to confuse you. If you don't understand the question, just tell me and we will clear it up, we will clarify it.

The Witness: At the time this discussion took place with Mr. Schneider, and now——

Q. (By Mr. Yeates): Your testimony at this time is that this statement which was reported in the notes of Mr. Schneider, which I have read to you and which you read at the time he gave it to

(Testimony of James Thomas Wolcott.)

you, in these notes which were taken by him, is incorrect? [223] A. Now?

Q. Yes. A. As a fact, now?

Q. Yes. A. Yes, they are incorrect.

Q. And was it incorrect at the time you gave these notes—or these notes were taken by Mr. Schneider?

A. Could I ask how you—what is your question?

Q. You answer “yes” or “no.”

A. That question I cannot understand.

Mr. Yeates: Will you read the question back to him?

(The reporter read as follows: “Question: And was it incorrect at the time you gave these notes—or these notes were taken by Mr. Schneider?”)

Trial Examiner: An incorrect statement of fact?

The Witness: As it exists in my——

Q. (By Mr. Yeates): Do you understand what the question is now?

A. I don’t understand what the question is now, and what it refers to.

Mr. Yeates: Read it again, Mr. Reporter.

(The reporter re-read as follows: “Question: And was it incorrect at the time you gave these notes—or these notes were taken by Mr. Schneider?”) [224]

Q. (By Mr. Yeates): Mr. Wolcott, you stated in your testimony that it is your testimony now that this statement I have read to you from the

(Testimony of James Thomas Wolcott.)

notes of Mr. Schneider is incorrect. We are referring to the statement: "In some cases employees are put to work before clearance. I then arrange for clearance with the union local at Fresno," et cetera. Is it your testimony now that that is incorrect?

A. Would you read it again, please?

Q. "In some cases employees are put to work before clearance. I then arrange for clearance with the union local at Fresno. Usually, before an employee reports for work, he first goes to the union and obtains a clearance."

A. Your question is, is that correct now, as a fact now?

Q. You had stated prior in your cross examination that this is an incorrect statement and it is your testimony now that that is incorrect.

A. As it exists now. It is not always correct. It happens.

Q. Now my question is: Was this incorrect at the time Mr. Schneider took the notes?

A. I didn't argue that particular point with him then.

Q. Could it have been correct at the time you gave him the statement?

A. It might have been.

Q. It might have been correct.

Referring to the same notes of Examiner Schneider, there [225] is a statement: "Late in March 1957 I mentioned to Fudge that we might put Tuttle to work on the swing shift. Fudge said that

(Testimony of James Thomas Wolcott.)

it would be fine with him." Now, do you recall that statement being in the notes of the field examiner?

A. Yes, I do.

Q. And I will ask you, is your testimony now that that statement appearing in these notes is an incorrect statement?

A. No; that is a correct statement.

Q. Was your purpose in calling Mr. Fudge for this on Mr. Tuttle because you had known he had had disagreement with Mr. Fudge?

A. No.

Q. Who did Mr. Myers come as a replacement for?

A. He wasn't a replacement. There was nobody left about that time that I can recall.

Q. Was there somebody going to leave?

A. Yes.

Q. When was it that Mr. Sharp was intending to be transferred, going to Wishon?

A. I don't know when he intended going. I know when he left Black Rock.

Q. Was Myers a replacement for Sharp or was he to come because of the fact that Sharp was leaving?

A. That wasn't discussed with me at the time that Mr. Myers was employed. [226]

Q. Are you the one who employed Mr. Myers?

A. Yes. I made arrangements for him to be employed at the job.

Q. And I have here the payroll record for Freddie Myers that states that he went to work in the week of March 3rd. That would be—you probably,

(Testimony of James Thomas Wolcott.)

Mr. Wolcott, know, looking at that, you probably know what day that might be.

A. What was your question?

Q. Could you tell me from that payroll record note there, could you tell me what date it appears that Mr. Ryan—I mean Mr. Myers—was employed?

A. It appears that he was employed or signed up for employment February the 28th.

Q. What is the date that he reported for work?

A. I don't see how you can tell that from this. In fact, you can't tell.

Q. Doesn't it state on the hours there when he came to work?

A. This would indicate that his first day of work occurred during the week ending March the 10th. They have no time for the week ending March 3rd, which indicates to me that he was signed up. Otherwise there would be no occasion to indicate no time.

Q. I am asking you: Does this indicate when he first worked at the Black Rock project?

A. He first worked, as I would interpret this, the Monday of the week ending March 10th. [227]

Q. And are you in disagreement with that date as the working date of Mr. Myers?

A. I don't keep the payroll records, but it indicates here, this indicates to me that he started first working, put in his first physical work for us the Monday of the week ending March 10th.

Q. Would you be satisfied that that was the first day that he reported for work?

(Testimony of James Thomas Wolcott.)

Mr. Smith: I am going to object, from the standpoint there has been no testimony that Mr. Wolcott knows when men go to work or when they leave work or anything else.

Mr. Yeates: That is not the question.

Trial Examiner: I take it, the question is this: Are you raising any question about the payroll record that you have in front of you, or do you accept that as a correct statement?

The Witness: That——?

Trial Examiner: That he went to work on or about the 10th of March.

The Witness: Yes, I accept this, that he went to work——

Q. (By Mr. Yeates): If you were going to look up the date that Mr. Myers went to work for your own purposes, is this the record that you would refer to? A. No. [228]

Q. But you accept this as being correct?

A. As to what?

Q. As to the first day that Mr. Myers worked at the Black Rock project.

A. It's acceptable to me.

Q. These are records prepared by the company?

A. Yes.

Q. And on the employment of Mr. Ryan, this payroll record prepared by the company states that he first came to work in the week preceding March 31st?

A. It would not state when he came to work.

Q. Does it indicate——

(Testimony of James Thomas Wolcott.)

A. I mean as such. This is a record of hours.

Q. That he worked. If he would have worked before that time, would he have not been paid for it?

A. I would certainly assume so. I don't handle the payroll. I would assume so.

Mr. Smith: I wonder if we could have a short recess, a very short recess here.

A. I am not a payroll clerk.

Trial Examiner: Well, we are right here on General Counsel's examination. If we have one, we will have to have it with his approval.

Mr. Yeates: I am almost through.

A. What was your question, sir? [229]

Q. (By Mr. Yeates): Would you accept that as being a correct statement of the first day that Mike Ryan worked at the Black Rock project?

A. Yes.

Q. Very well. On the role of Morrison—

Trial Examiner: When was that date?

Mr. Yeates: It is in the week ending March—he was employed during the week ending March 31st.

The Witness: Could I ask a question, sir?

Mr. Yeates: Certainly.

The Witness: That indicates he worked the full week, starting on a Monday, and worked the full week ending March 31st. The week ends on a Sunday. So he, as I would interpret this, started work on a Monday of the week which ends March 31st.

Trial Examiner: Does that card show the date on which he was hired?

(Testimony of James Thomas Wolcott.)

The Witness: It shows at 3/25/5—I believe that is correct—down in the corner.

Q. (By Mr. Yeates): Mr. Wolcott, the role of Morrison-Knudsen in these joint ventures, where they are acting in the capacity they are acting in at Kings River and the Morrison-Walsh-Perini, in their role, they assembled the crews for that work, is that correct? They are the ones who have the duty and it is their obligation to get the work crew to perform that work? [230]

A. Morrison-Knudsen Company is the sponsoring partner.

Q. As the sponsoring company, it would be their responsibility to see that the crew was assembled?

A. Yes.

Q. And is the equipment used in those joint ventures Morrison-Knudsen's equipment?

Mr. Smith: Objection. This has nothing to do with, that I can see, with the direct examination. It is improper cross.

Trial Examiner: I don't know as it is.

Mr. Yeates: He took him through all his qualifications.

Trial Examiner: You are correct. What I was thinking is: What is the materiality of it?

Mr. Yeates: I am trying to show the close relationship with Morrison-Knudsen in all these operations.

Trial Examiner: Is there any real question, any real issue there?

(Testimony of James Thomas Wolcott.)

Mr. Yeates: Not in my mind, if the Trial Examiner feels that has been sufficiently covered.

Trial Examiner: I just don't see an issue there.

Mr. Yeates: I just wanted to be sure that the record was clear on showing the close relationship between Morrison-Knudsen and the joint venture in all these operations.

Trial Examiner: Has that reference against whom an order should issue, in the event an order were issued? Is that your point? [231]

Mr. Yeates: The relationship I am driving at is the relationship between Mr. Perkins and Morrison-Walsh-Perini or Kings River——

Trial Examiner: Yes, I see what you are getting at. He may answer.

The Witness: Would you restate the question.

Q. (By Mr. Yeates): Is the equipment used when Morrison-Knudsen is sponsoring the project, or the joint venture, the equipment of Morrison & Knudsen, unless additional equipment is purchased?

A. Kings River Constructors?

Q. Yes. A. I don't know.

Q. In each case, locally, would it be——

A. In each case it's got "Morrison-Walsh-Perini" or "Kings River Constructors" on the doors. That is all I know.

Q. You are presently paid by Morrison-Walsh-Perini? A. No.

Q. Were you at the time of the Kings River, the matter in question? A. Yes.

Q. Who are you being paid by now?

(Testimony of James Thomas Wolcott.)

A. Morrison-Knudsen Company.

Q. Had you ever served in a joint venture before, in a capacity of labor coordinator for a joint venture, in which Morrison & Knudsen was the sponsoring company?

A. Before what?

Q. Kings River Constructors.

A. Yes.

Q. During that time by whom were you paid, on the previous joint venture?

A. I was employed by and paid by Morrison-Walsh-Perini, before the Kings River Constructors work began.

Q. Prior to that time had you ever been engaged, or did you ever participate in, a joint venture in which Morrison-Knudsen was the sponsoring company?

A. No.

Q. Was it your understanding at the time you were working for Morrison-Walsh-Perini that you would again be employed by Morrison-Knudsen at some future date after that?

A. I had no particular understanding beyond my current assignment.

Q. You are now working for Morrison-Knudsen Company?

A. Yes, I am now.

Q. And prior to the time that you went to the Morrison-Walsh-Perini, or whatever the deal is, you were employed by Morrison-Knudsen?

A. Yes.

Q. Had you known Mr. Perkins prior to February 1957.

A. Yes. [233]

Q. Had you worked with Mr. Perkins on previous projects?

A. Yes. One.

(Testimony of James Thomas Wolcott.)

Q. Where was your office in Fresno in relation to the office of Mr. Perkins during the period of the Kings River Constructors?

A. My office was at 1825 Merced Street. His office was on the project.

Q. Did Mr. Perkins have any office at all in the office in Fresno?

A. He did for a short time before the weather opened up and he got back to the job.

Q. Did you see Mr. Perkins at the Wishon project? A. When?

Q. During this period in question.

A. Would you state the period in question?

Q. February 1957.

A. Did I see him on the project in February?

Q. Anytime in February.

A. I don't think so. It is possible, but the weather was pretty bad then.

Q. Did you see him around Fresno at any time?

A. Yes.

Mr. Yeates: That is all.

Trial Examiner: We will have a short recess.

(Short recess.) [234]

Trial Examiner: We will resume.

Redirect Examination

Q. (By Mr. Smith): Have you a contract of employment with Morrison-Knudsen? A. No.

Q. Do you know anybody that lucky?

A. No, I am afraid I don't.

Q. When Mr. Albert Schneider, the field exam-

(Testimony of James Thomas Wolcott.)

iner for the Board, visited you sometime in May 1957 did he advise you of the purpose of his business, or of his visit?

A. He said he was there with regard to a charge.

Q. Did he advise you who made the charge?

A. Yes.

Q. Would you state?

A. Yes. Mr. M. E. Tuttle had made the charge.

Q. Did he advise you against whom the charge had been made?

A. He said against Kings River Constructors.

Q. Prior to Mr. Schneider's visit had you been advised that an unfair labor practice charge had been made against Kings River Constructors with respect to Mr. Tuttle?

A. We had seen a copy of the charge, I believe, before that.

Q. Had you seen it or had you been advised of it?

A. I think we received a copy of the charge, itself. I had had no contact with any member of the Board, as I remember.

Q. At the time that you first became aware of the unfair [235] labor practice charge having been filed did you call me in the Boise office?

A. (No response.)

Q. Just "yes" or "no." At that time, that you first became aware that a charge had been filed.

A. That a charge had been filed, no, I didn't call you.

(Testimony of James Thomas Wolcott.)

Q. At the time of Mr. Schneider's visit to you did you call me in the Boise office? A. No.

Q. Did Mr. Schneider ask you, ever, to prepare in your own words any statement concerning Mr. Tuttle? A. No, he did not.

Q. Did you ever do so? A. No.

Q. Did Mr. Schneider at the time he was making these notes advise you of the exact nature of the notes or statement he was preparing?

A. No, he did not.

Q. Were these deleted words referred to by Mr. Yeates in his cross examination, these deleted words in the investigator's statement, were they your words or were they those of Mr. Schneider?

A. They were not mine. They were his. I told him it was entirely incorrect.

Q. Did Mr. Schneider propound the statements to you or did [236] you propound the statements to him? A. Which statements?

Q. Did Mr. Schneider frame his questions in the form of statements, asking whether they were true or false?

A. He asked several questions, but not as to whether they were true or false. He asked questions and took notes and later handed me the written-out form, or the written, rough form, in whatever it is there.

Q. And you told him at that time that there were many inaccuracies? A. Yes, I did.

Q. Mr. Wolcott, you have testified that you were working for both Morrison-Walsh-Perini and Kings

(Testimony of James Thomas Wolcott.)

River Constructors then, although you were on the payroll solely of Morrison-Walsh-Perini——

A. That is correct.

Q. The project manager of Morrison-Walsh-Perini was who? A. Mr. Bert Perkins.

Q. And the project manager of Kings River Constructors was who? A. Mr. Jack DeLay.

Q. In working for two different employers and two different project managers, did Mr. Perkins at any time advise you or give you instructions with respect to Kings River Constructors?

A. No, he did not. [237]

Q. Did he have authority to do so? A. No.

Q. And did Mr. DeLay at any time advise you with respect to your employment with Morrison-Walsh-Perini? A. No.

Mr. Smith: That is all.

Mr. Yeates: No further questions.

Trial Examiner: I want to ask you a few questions. It may be repetitious. There are a few things that are not entirely clear to me.

When was the first knowledge that you had that Mr. Tuttle wanted a job on the Kings River project?

The Witness: When he came to my office.

Trial Examiner: Is it your testimony that you had no knowledge prior to that time that Mr. Tuttle was interested in securing employment?

The Witness: I had had no knowledge prior to that time.

Trial Examiner: Is it your testimony that Mr.

(Testimony of James Thomas Wolcott.)

Perkins had not spoken to you prior to that time about Mr. Tuttle?

The Witness: I don't recall that's in the testimony, but he hadn't spoken to me. He had not.

Trial Examiner: In the hiring process of employees on the Kings River project, I believe you have testified that before anybody was hired it would be referred to you. Is that correct? [238]

The Witness: The project manager in some cases hired people. But it was coordinated, the hiring was coordinated, through me. We worked together.

Trial Examiner: If he hired somebody directly, he would inform you immediately, is that correct?

The Witness: Not necessarily, no. He was my boss.

Trial Examiner: And he didn't have to report to you, in other words? Is that right?

The Witness: No, sir.

Trial Examiner: You have testified that when Mr. Tuttle first came to you with respect to a job on the Kings River project, you informed him at that time that there was no job opening at that time?

The Witness: I told him I had nothing for him, sir, at that time.

Trial Examiner: Did Tuttle make any reference to a specific job that he wanted or that he had in mind?

The Witness: I don't recall that he did on the first visit.

(Testimony of James Thomas Wolcott.)

Trial Examiner: Well, let's keep this to the first visit.

The Witness: No.

Trial Examiner: Did he mention Mr. Sharp to you on this first visit?

The Witness: No, I don't recall that he did.

Trial Examiner: Incidentally, did Mr. Sharp at any time [239] speak to you about Mr. Tuttle?

The Witness: No. I don't think so.

Trial Examiner: Do you know Mr. Sharp?

The Witness: Yes, I do.

Trial Examiner: I believe you have testified that this payroll record shows that Myers was hired on February 23rd.

Mr. Yeates: I believe it was the 28th. Pardon me.

Trial Examiner: Will you take it and look at it again, just to verify that?

Mr. Smith: I was under the impression that he had testified that the date there was 3/25.

Mr. Yeates: That was Ryan.

Trial Examiner: I am talking about Myers now. Anyhow, he has the card before him now.

Mr. Smith: Excuse me.

The Witness: The date of 2/28/57 is given here by badge number.

Trial Examiner: What does that mean? I don't know what "badge number" means. What does it mean to you?

The Witness: To me, it means that he was hired that date.

(Testimony of James Thomas Wolcott.)

Trial Examiner: Well, is a man assigned a badge number when he is hired?

The Witness: No. We didn't use badges on this project.

Trial Examiner: Why do you think that would indicate the date of his hiring? [240]

The Witness: Well, the "22857" is 2/28/57.

Trial Examiner: But why do you think coming under the head badge number, that that would indicate a date of hiring?

The Witness: I believe they put the date of hiring on these.

Trial Examiner: Do you have any independent recollection as to the date of Myers' hiring?

The Witness: He was called for.

Trial Examiner: Do you know who called for him?

The Witness: Excuse me, I am not referring to a call to me. There was a discussion of his hiring late in February and I believe that's about when he was hired. But sometimes I would make arrangements to hire a man and he might go sign in at payroll and say, "Well, I have got to go get my trailer," or "I have got other business. Can I report on such-and-such a day to go actually to work?"

Trial Examiner: What I really want to know, and I wish you would search your recollection carefully before you answer: Had you made arrangements to hire Myers before or after you saw Tut-

(Testimony of James Thomas Wolcott.)

tle? Or did you make such arrangements before or after?

The Witness: I made those arrangements after I had first seen Mr. Tuttle.

Trial Examiner: Now, you knew, then, at the time that you made the arrangements for hiring Myers that Tuttle wanted a job, is that correct?

The Witness: He was on application.

Trial Examiner: Well, was he——

The Witness: Along with others, of course.

Trial Examiner: Can you tell me this: Whose application came first, Myers' or Tuttle's?

The Witness: Mr. Myers wasn't on application with me.

Trial Examiner: How did——

The Witness: I just wanted a——

Trial Examiner: How did Myers' hiring come about, if you know?

The Witness: (Continuing) ——good worker.

Trial Examiner: How did Myers' hiring come about?

The Witness: Mr. DeLay contacted me and said, "Get me a good warehouseman." And I discussed it with Mr. Fudge. He said he had a good one. I said, "Fine. Send him up."

Trial Examiner: The question will arise then, in the mind of everybody who has anything to do with this case, knowing that Mr. Tuttle was an applicant, why did you feel it necessary to call Mr. Fudge?

(Testimony of James Thomas Wolcott.)

The Witness: I didn't feel Mr. Tuttle was very well qualified.

Trial Examiner: Would you explain?

The Witness: Well, for one thing, his age. And also his attitude and the way he applied for the job and discussed his background. [242]

Mr. Yeates: Mr. Trial Examiner, I think this matter that you are discussing now goes outside of the matter of the general denial of the answer.

Mr. Smith: I was going to interject here that I couldn't see where it was leading. I don't think there has been an allegation in the complaint that we were selecting one workman over another or anything of that nature. And I can't see that it is entirely relevant or material.

Mr. Yeates: I think as far as—in regard to the pleading, I think there is no affirmative defense pleaded that he was not qualified for this work or that they considered him to be unqualified.

Trial Examiner: Well, Mr. Yeates, the complaint alleges that this man was denied employment because he didn't get clearance through the union. That is the substance of the complaint, is it not?

Mr. Yeates: That is right.

Trial Examiner: I am trying to find out what the facts are. Whether they are outside the actual answer or not, I still want to as far as possible find out the facts.

Then, is it your testimony that you considered that because of age and the manner of his approach

(Testimony of James Thomas Wolcott.)

to the matter Mr. Tuttle was not qualified for the job?

The Witness: I wasn't impressed——

Mr. Yeates: May I have an objection to that?

Trial Examiner: Certainly you may have an objection.

And incidentally, anytime I ask a question it is just as if an attorney were asking a question. Anybody can object to any question. I have a bit of an advantage because I can overrule you, but you can object.

Mr. Smith: I was aware of that fact. I wasn't sure, myself, what your line of testimony was leading to.

Trial Examiner: My whole inquiry is to as far as possible try to find out what the facts are.

Mr. Smith: We have nothing to hide there. I will volunteer the statement that I believe the employer maintains throughout his employment process the right to determine the qualifications and choose and hire and fire whom he pleases.

Trial Examiner: When you hired, actually Mr. Myers was hired in preference to Mr. Tuttle?

The Witness: That is correct. I didn't feel that merely because he might have been in on application necessarily required that I hire him. We had no seniority or anything comparable.

Trial Examiner: The next time that you—well, I think we might go into the next time, but at a later time you did get in touch with Tuttle with respect to hiring him?

(Testimony of James Thomas Wolcott.)

The Witness: Yes, I did.

Trial Examiner: What kind of job were you going to hire [244] him on on this later occasion?

The Witness: He was to be hired at Black Rock when Mr. Maples——

Trial Examiner: Was this a different type of job from the one that you filled the first time?

The Witness (continuing): ——when Mr. Maples quit.

No.

Trial Examiner: The same type of job?

The Witness: We had, however, used up some of the men whom we tentatively had in mind.

Trial Examiner: It was still a warehouse job?

The Witness: Yes.

Trial Examiner: That you had in mind for him?

The Witness: Yes.

Trial Examiner: May I ask you, then, why did you try to get in touch with him to hire him if you considered that he wasn't qualified?

The Witness: Because it was later mentioned to me by Mr. Atkins that if Mr. Tuttle was still around, he thought at that time he could use him.

Trial Examiner: Mr. Atkins spoke to you?

The Witness: Yes.

Trial Examiner: Had Mr. Atkins spoken to you about Tuttle prior to the time you first saw Tuttle?

The Witness: No. [245]

Trial Examiner: But between that time and the time that you got in touch with Tuttle Atkins did speak to you, is that your testimony?

(Testimony of James Thomas Wolcott.)

The Witness: Yes.

Trial Examiner: Did he tell you he wanted Tuttle?

The Witness: He asked if he was still around, and he said, "I believe I can use him." This was about the 15th or the middle of March, somewhere along in there.

Trial Examiner: Then you did get in touch with Tuttle?

The Witness: Yes.

Trial Examiner: With respect to giving him, offering him a warehouse job?

The Witness: Yes, offering him a warehouse job.

Trial Examiner: What happened to that? You carried it so far and then you didn't really—your testimony didn't cover what happened to this move on your part to hire Mr. Tuttle.

The Witness: After I had talked twice to Mr. Tuttle I was advised later, about the 11th or 12th of April, that the district manager of the company and the project manager of this project had decided to eliminate the night shifts, which, of course, eliminated those jobs.

Trial Examiner: And that is the reason the offer never came to anything?

The Witness: That is right. There was no job left on which I could send him. [246]

Trial Examiner: Did you at any time during this period when Tuttle's application was pending with you, did you discuss Tuttle with Fudge?

(Testimony of James Thomas Wolcott.)

The Witness: Along about the 1st of April, when there was discussion about Mr. Maples leaving, I told Fudge that we would probably next send up Mr. Tuttle, that we still had him on application.

Trial Examiner: Was it customary for you to tell Fudge that you were going to hire somebody before hiring him?

The Witness: Not necessarily. But in this case there was the question of Mr. Maples leaving—and we sometimes discuss people on application back and forth.

Trial Examiner: What did Fudge say?

The Witness: He said something to the effect, "Well, he is your man and you pay the bill," something to that effect, "If that is your decision," or——

Trial Examiner: Did he say anything as to whether or not he would approve giving him a job?

The Witness: He said, "If you want him, that is your decision," something, I think he said, "That is fine with me," something of that nature.

Trial Examiner: Is that the first conversation you had had with Fudge with respect to Tuttle?

The Witness: Beg your pardon?

Trial Examiner: Is that the first conversation you had [247] had with Fudge with respect to Tuttle?

The Witness: I believe we discussed it briefly around the middle of March.

(Testimony of James Thomas Wolcott.)

Trial Examiner: Let me ask you this: Did you discuss the matter of Tuttle with Fudge at any time prior to the time you hired Mr. Myers?

The Witness: No.

Trial Examiner: You are positive about that?

The Witness: Yes.

Trial Examiner: Did Perkins ever say anything to you about hiring Tuttle?

The Witness: No.

Trial Examiner: Do you have anything further of Mr. Wolcott, Mr. Smith?

Mr. Smith: I have no further questions.

Trial Examiner: Do you have anything further, Mr. Yeates?

Mr. Yeates: No.

Trial Examiner: You are excused.

(Witness excused.)

Trial Examiner: What is your pleasure, Mr. Smith?

Mr. Smith: Again I renew my motion.

Trial Examiner: Are you resting?

Mr. Smith: We are resting. I beg pardon.

Trial Examiner: You are resting?

Mr. Smith: We are resting, [248]

Trial Examiner: Do you have anything further?

Mr. Yeates: I have one question I would like to ask Mr. Tuttle.

MANFRED E. TUTTLE

a witness called by and on behalf of the General Counsel on rebuttal, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Yeates): You are the same Mr. Tuttle who has been previously sworn?

A. That is right.

Q. Mr. Tuttle, where did you first see Mr. Wolcott in relation to the job at Black Rock project?

A. I saw Mr. Wolcott in front of the office, the general offices, at Black Rock, the first time I ever met the man.

Q. What date was that?

A. That was on or about February the 27th, 26th or 27th.

Q. Had you seen Mr. Wolcott previous to that time in his office?

A. I saw him sitting behind two or three different people the morning that Mr. Bert Perkins took me to the office. But I didn't see, talk to him nor speak to him, and he was busy with other people. Mr. Perkins gave the girl, he wrote a note with my name on it and told the girl at the office to keep me in mind for Jack's place at Black Rock.

Trial Examiner: When you saw him at Black Rock did you speak to him? Were you introduced to him?

The Witness: I spoke to him.

Trial Examiner: Were you introduced to him?

The Witness: No. I wasn't introduced to him.

(Testimony of Manfred E. Tuttle.)

I was told that that was his car outside, and I was with a Mr. Dan Tracy, and Tracy sat in the car all the time I talked to him. And Mr. Tracy is in town here, with a broken leg, I believe.

Trial Examiner: You knew Mr. Tracy and Mr. Tracy knew you, is that right?

The Witness: He took me up there. I rode up in his car.

Trial Examiner: Well, was Mr. Tracy present when you saw Mr. Wolcott?

The Witness: Well, what do you mean by "present"?

Trial Examiner: I just want to know whether your name was mentioned to Mr. Wolcott or whether you were identified to him in such a manner that he would remember you.

The Witness: I identified myself to Mr. Wolcott.

Trial Examiner: In what way?

The Witness: I went up and told him that Mr. Perkins had told me to go up and take Jack Sharp's place at the warehouse. And Mr. Wolcott told me right there that Mr. Perkins had absolutely no jurisdiction over that place at all. And I said, "Well, it's peculiar to me that Mr. Perkins can take a man out of a job but can't put one in his place." [250]

Trial Examiner: That is what you said to Mr. Wolcott?

The Witness: That is what I said to Mr. Wolcott.

(Testimony of Manfred E. Tuttle.)

Trial Examiner: In other words, you were sort of questioning his authority?

The Witness: Yes. And he said, "Well, that is the way it is." And that is all the conversation we had until the next day, when I was in his office.

Trial Examiner: And it was the next day that you went to his office?

The Witness: The next day I went to his office again. That was after I had been in previously with Mr. Bert Perkins.

Trial Examiner: Excuse me, Mr. Yeates.

Q. (By Mr. Yeates): And where did this conversation take place with Mr. Wolcott?

A. Well, it's right in front of the general offices there, you know, their head offices at Black Rock or Haas Tunnel, or whatever you might call it.

Q. Was there an automobile of Mr. Wolcott's there? A. Yes, there was.

Q. Did you see the automobile?

A. Yes. He was standing right in the door of it.

Q. What type of automobile was it?

A. I don't know.

Q. What color? Did you notice the color?

A. No, I never even—I know that I stood by it because one [251] of the boys pointed out the car for me, to, me, and said for me to stand by it, that that was the best place to catch him.

Q. This gentleman you talked with at that time, is that Mr. Wolcott, sitting in on this hearing?

(Testimony of Manfred E. Tuttle.)

A. That is Mr. Wolcott, sitting right there (indicating).

Mr. Yeates: That is all.

Cross Examination

Q. (By Mr. Smith): But you admit, Mr. Tuttle, that you were advised on this Monday, the first time you went up to Kings River Constructors' office, you admit that you were advised that Mr. Perkins had no authority with respect to Kings River Constructors?

A. That is what Mr. Wolcott told me, that I just testified to it.

Q. And thereafter you did not seek a job from Mr. Perkins? A. Yes. Many times.

Q. You sought work with Mr. Perkins, did you?

A. I saw Mr. Perkins because I knew him, my wife knows his wife, and my wife and Mrs. Perkins were well acquainted.

Q. But he did not give you a job after that?

A. No. He told me several times just to have a little patience, he would get something for me pretty soon.

Q. And the next time you were offered employment by Kings River Constructors was on or about April 4, when Mr. Wolcott called you on the mobile phone? [252]

A. No. The next time was on or about March the 27th.

Q. Who offered you employment?

A. Mr. Atkins.

(Testimony of Manfred E. Tuttle.)

Q. Who offered you—Mr. Atkins?

A. Atkins called the union.

Q. Did he talk to you? A. Who?

Q. Atkins.

A. No, not until I went up there. But I had had my mail forwarded.

Q. I am asking you what Mr. Atkins asked you. Did Mr. Atkins offer you work? A. Yes.

Q. When?

A. Well, he called the union for me.

Q. How do you know? I am asking you what— A. He told me so.

Q. I am asking you what Mr. Atkins—if Mr. Atkins offered you work, Mr. Tuttle.

A. That is right.

Q. When?

A. That was, I think, around about the 7th.

Q. What did he say to you? A. What?

Q. He offered you a job? [253]

A. That is right.

Q. What did he say to you?

A. He said to me, "You go back down and talk to"—he says, "I called you by name"—

Q. I am not asking you that. I am asking you if Mr. Atkins offered you a warehouse job.

A. That is right. He did.

Q. What did he say?

A. He said, "I called you, for you personally." That is what he said.

Q. I am not asking you whether he called somebody. I am asking you what he told you.

(Testimony of Manfred E. Tuttle.)

A. You asked me whether he offered me a job.

Q. Did he?

Mr. Yeates: I think this is argumentative.

Mr. Smith: It is argumentative, but it is important.

Mr. Yeates: If it is argumentative, you can tell Mr. Smith to reframe his question and have the witness answer the question, Mr. Examiner. I see no reason for the——

Trial Examiner: Mr. Smith has asked him several times.

Mr. Yeates: That is right.

Trial Examiner: Did Mr. Atkins offer you a job? Did he offer you one?

The Witness: He called for me on the phone and told Mr. Fudge—— [254]

Trial Examiner: Were you there when he——

The Witness: No. I only know what he told me. But Mr. Atkins, himself, told me.

Mr. Smith: I will insist that he answer the question.

Q. (By Mr. Smith): Did Mr. Atkins, to your face or on the phone, to you, offer you a job?

A. You want to know the whole conversation, is that it?

Mr. Yeates: Mr. Tuttle, will you answer the question he has asked you?

Q. (By Mr. Smith): Did Mr. Atkins, to your face or on the telephone, offer you employment?

Trial Examiner: Did he say, "I have a job for you. Come, go to work"?

(Testimony of Manfred E. Tuttle.)

A. No, he didn't say, "Come, go to work."

Mr. Smith: That is all I want to know.

Q. (By Mr. Smith): Did Mr. Atkins at any time to your face or in a telephone conversation——

A. I can answer that only——

Q. (Continuing) ——offer you employment?

Trial Examiner: Wait until the question is finished.

A. No. Not right to my face.

Mr. Smith: That is all I want to know.

The Witness: But I——

Mr. Smith: No; that is the answer.

Trial Examiner: Are you finished, Mr. Smith?

Mr. Smith: Quite, Mr. Examiner.

Redirect Examination

Q. (By Mr. Yeates): Will you state again for the record what your conversation was with Mr. Atkins?

A. My conversation, when I came into the warehouse, he says, "Mac, I called for you to Al Fudge personally and asked for you, and by name, and Mr. Al Fudge told me you were not eligible for any job up there." And he knew that we had had a battle.

Q. I don't want what he knew. I just want what he said.

A. He said, "You had a battle with Mr. Fudge and the best thing for you to do, Mac, is to go down and talk to him real nice and see if you can't

(Testimony of Manfred E. Tuttle.)

get him to clear you." And I said, "Mr. Atkins, I never crawled to a union agent in my life and I am never going to." He didn't——

Mr. Yeates: I have no further questions.

Recross Examination

Q. (By Mr. Smith): You admit, Mr. Tuttle, that at no time did a representative of Kings River Constructors offer you employment?

A. No, I don't admit to any such a thing. Mr. Perkins told me the first day——

Mr. Smith: That is all.

A. (Continuing) ——that I had a job.

Trial Examiner: Well, that has been covered very extensively, I believe. [256]

Mr. Yeates: I have no further questions.

Trial Examiner: You are excused.

(Witness excused.)

Trial Examiner: Is there anything further, Mr. Yeates?

Mr. Yeates: Nothing further.

Trial Examiner: Do you want to make an oral statement on the record, Mr. Smith? You wanted to renew your motion?

Mr. Smith: I wanted to renew my motion.

Trial Examiner: To dismiss the complaint in its entirety, I take it?

Mr. Smith: To dismiss the complaint in its entirety, because I think the evidence has conclusively shown, despite expressions of opinion or what were thought to be offers of employment in this

case but were not, in fact, offers of employment by authorized representatives of Kings River Constructors; that there was, in fact, no offer of employment; there was, in fact, no job opening for which Mr. Tuttle was being considered, except the tentative offer which was made to him by Mr. Wolcott, the opening for which evaporated, you might say, upon the discontinuance of shifts on or about April 12th, 1957.

There has been no showing of a general practice or requirement or agreement between the union and Kings River Constructors requiring the clearance of anyone. There has been no [257] showing that the union, in fact, refused at any time to clear Mr. Tuttle, for, in fact, there is no showing that the union had ever been requested by Kings River Constructors to clear Mr. Tuttle.

Trial Examiner: Well, if you credit Mr. Tuttle's testimony, which he has just given before he left the witness stand this time, that Mr. Atkins told him that he had specifically requested the union to clear him and the union refused, if you credit that, you have to deal with that proposition. You can argue that I should not credit it, but let's assume that I do credit it. Then what would you do with that?

Mr. Smith: Assuming he could——

Trial Examiner: That I credit him, that Mr. Atkins told him that.

Mr. Smith: Well, this is assuming for purposes of argument.

Trial Examiner: That is right. Merely arguendo.

Mr. Smith: That the statement attributed to Mr. Atkins, which Mr. Atkins, himself, denied——?

Trial Examiner: I am saying it is arguendo.

Mr. Smith: Right. Had any business calling Business Agent Fudge and could on his own, without more, ask Mr. Fudge to clear Mr. Tuttle——?

Trial Examiner: I think, Mr. Smith——

Mr. Smith: Still there is nothing in the record to say [258] that there was at that time immediately a job opening and that Mr. Tuttle would have been offered the job and have been hired by Mr. Atkins for the job.

Trial Examiner: Of course, too, I suppose there is a question of whether Mr. Atkins had any authority whatsoever to hire anybody on his own or to call the union office with reference to clearance. What is the evidence on that point?

Mr. Smith: I think the evidence clearly shows that Mr. Atkins made all requests for employees through Mr. Weatherman, the office manager, which were then referred to Mr. DeLay, the project manager, and then back either through Mr. DeLay or through Mr. Weatherman to the labor coordinator. The labor coordinator was the only man authorized to deal directly with the union in any dealings that he might have with the union.

Trial Examiner: Of course, I will ask Mr. Yeates for his view on those same points.

Mr. Smith: Yes. The labor coordinator is the only man who makes a direct offer of employment in most cases, that is, the only other man than the project manager.

In further argument, not restricted to the one point we have just discussed——

Trial Examiner: Oh, yes. I just thought that was a point that somebody should give a good deal of attention to.

Mr. Smith: Certainly. And we feel that certainly there has been no showing of a generalized practice, arrangement or [259] agreement existing. Therefore, we submit that in order for the counsel for the General Counsel to make out his case, he must have proved not just the assumption of the charging party, or the statement made by the charging party, but he must have proved that the union, in fact, did refuse to clear Mr. Tuttle, and we submit that any such thing as a hearsay remark made through Mr. Atkins would not be sufficient to meet that proof. There must be proof that the job, of course, was open, that there was an opening and that an offer of employment was made.

Trial Examiner: I think you probably will have to prove at least one of two things. I think the burden will be on the General Counsel to show a general practice on the part of the company to require clearance through the union before hiring. I think if that general practice was shown, that might be sufficient.

Mr. Smith: Yes. But it was not.

Trial Examiner: Absent that showing, I am not making any comment on what I think the evidence has shown. Absent that showing, of course, I think that the burden will be on General Counsel to show that Tuttle would have been given a job, except

that the union refused him clearance. I think the General Counsel's burden will be to prove one point or the other, at least.

Mr. Smith: That is our feeling, too.

Trial Examiner: I think, Mr. Smith, that people reading [260] the record will have questions in their minds. Here is Tuttle. He has been with the company for some long time. There was no showing that he was incompetent. The only showing with respect to qualifications, or reflecting on his qualifications, is the showing that he is 70 years old. And here he was wanting a job and, if his testimony is credited, I think there is nothing to the contrary on the point, Sharp, who was leaving the company, was trying to promote him into the vacancy to be made by Sharp's transfer, and apparently Atkins was perfectly willing to have him. So the question will arise: Well, why wasn't the man given a job? What was wrong there? Why didn't he get the job? I think that those are the sort of questions that people are going to ask in reading the transcript of this proceeding.

Mr. Smith: Well, if they are going to read between the lines and, of course, hold us responsible or guilty by implication, maybe that would come out that way. But——

Trial Examiner: Well, you shouldn't be held responsible on mere conjecture or mere suspicion. It would have to be at least on a reasonable inference.

Mr. Smith: But in each case, though it may not clearly show in the record, each job opening was filled by a man whom the project management had

specifically requested or wanted. Now, that is each job opening during this time.

Trial Examiner: No, I don't believe that——

Mr. Smith: I don't think it is in the record too clearly. I grant you that.

Trial Examiner: I believe Mr. Wolcott's testimony was that nobody had recommended Myers, that Myers was hired through the union, by calling on the union to supply a man. That is the way I understood his testimony.

Mr. Smith: Of course, we submit, too, again, as I mentioned before, that there has been no showing, there is nothing in the complaint which alleges that, or in the testimony which attempts to establish, that Mr. Tuttle should have been hired rather than another man.

Trial Examiner: Outside of union affiliation, it is none of our business who the company hires. The company is the sole judge of qualifications. You are entirely right to determine the qualifications.

Mr. Smith: That is right. Or that there is any waiting list or anything like that involved.

Trial Examiner: No, I don't think so.

Mr. Smith: I do at this time make a specific motion with respect to paragraphs of the complaint, if that is in order.

Trial Examiner: Yes. I suggest, what you want to do is make your motion complete and specific, I think, just to have it apply to each and every allegation of the complaint not admitted, that is, outside of the commerce allegations, let you move

to dismiss separately. Isn't that what you want to do? [262]

Mr. Smith: I move to dismiss separately, yes. And I want to point out with respect particularly to paragraph VII of the complaint, being an allegation of general practice or arrangement applying to all employees, that the proof has not been met. I believe that, in fact, there is no particular allegation in the complaint of any acts which would constitute a violation of Section 7 of the Act, and also of Section 8 (a) (1) of the Act. And I, of course, move that that paragraph of the complaint be stricken.

Trial Examiner: Well, your motion will be considered. Your motion will go as to that paragraph and all of the paragraphs specifically alleging an unfair labor practice.

Mr. Smith: Well, if you were not disposed to grant the general motion at this time, I would like a separate ruling on paragraph VII.

Trial Examiner: All right.

Do you wish to be heard on the motion, Mr. Yeates?

Mr. Yeates: Just very briefly.

I am not going to deal with the facts because I think the record is best illustrative of that. I want to just point to the testimony of Mr. Maples, which was that he was hired directly by Mr. Atkins, and also Mr. Atkins' testimony of the fact that he called Los Angeles on his own for particular employees certainly shows that he was in a position [263] of considerable authority with the company.

As far as the responsibility of the company for statements by Mr. Atkins, I would just cite the Drico Industrial Corporation at 115 NLRB, page 931, and the authorities cited in that decision.

Trial Examiner: That is a holding, I take it——

Mr. Yeates: Responsibility for the conduct of others by the company.

Trial Examiner: That would hold certainly as to an 8 (a) (1) statement. If Mr. Atkins had made an 8 (a) (1) statement, coercive statement, of course the company would be bound by that, but would it be bound by some statement of Mr. Atkins with reference to hiring if it were shown that Mr. Atkins had no authority in the matter of hiring?

Mr. Yeates: General Counsel's contention is that it would. Of course, we are not contending that he didn't have authority, but *arguendo*, I would say that as far as employees who worked under him and in that area, Atkins was a supervisor as defined by the Act and, as such, he had effective authority to hire and fire, and any secret limitations of that authority pursuant to some little tied-up arrangements between the company and Atkins or the union and the company on that, I say, do not extend to the employees so as to prevent any statements of that from being violative of the Act.

And I call your attention, Mr. Examiner, to the decision of the Ninth—or in the Third—Third Circuit, NLRB-Local 369 of [264] the Hod Carriers, 39 LRRM 2142, enforcing a Board order, stating that on these matters your record is not going to

be explicit on the fact that a fellow was told, "No, we have an arrangement with the union and we can't hire you," that has to speak from the facts as they show the application, what happened to the application and the facts surrounding that, and I think on that contention, that is, General Counsel's contention is that he was denied employment because he could not clear through the union, and that, secondly, there was a general practice of the company and the union that they would clear people through the union, and if a person could not clear through the union, if they were persona non grata with the union, the company did not hire them. And I think that——

Trial Examiner: You think the general practice is established on the basis of Tuttle's testimony as to what Atkins told him?

Mr. Yeates: No. I think it is much more strongly emphasized by the information obtained from Mr. Atkins by Mr. Schneider and——

Trial Examiner: You don't mean Mr. Atkins, do you?

Mr. Yeates: The one by Mr. Atkins, first, and then the statement by Mr. Wolcott to Mr. Schneider. And I will leave the matter to the record, as to what it shows. But it is our contention that it shows that there was, in fact, some arrangement [265] and a procedure followed. And furthermore, that there were two openings. There was the Sharp transfer, which, the testimony shows, everybody knew that that was coming up. There was the Myers termination in which he was replaced by Ryan.

And there were job openings that occurred at the time when the application of Tuttle was in. I feel, in line with the Swinnerton-Walburg case, as I have already said, with the practice that was being conducted by the company and the union, that irregardless, he could not have worked for the company.

Trial Examiner: What about the testimony that he was actually called with respect to a job opening? Would you attribute any significance to that?

Mr. Yeates: Afterthought. I think that at that time the company was aware they were going to be involved in a matter and that they were trying to cover their tracks as best they could at that time.

Trial Examiner: Had a charge been filed at that time?

Mr. Yeates: No, a charge had not been filed. But this is a sophisticated company. They have dealt with these unions and this type of thing a good many times in the past.

Trial Examiner: Do you have anything that you want to add, Mr. Smith, to the oral exchange here?

Mr. Smith: I thought we had established that our company was hardly sophisticated, or we [266] wouldn't have been here in the first place. That is our reason for having a job.

Trial Examiner: You deny the charge of sophistication?

Mr. Smith: Anybody in Idaho can't claim to be sophisticated.

Mr. Yeates: My slip, what is it, on the wrong side of the sheet—?

Trial Examiner: Well, we don't want to get into undercover matters here.

Mr. Yeates: At this time I would like to make a motion that the pleadings conform to the proof as established at the hearing.

Trial Examiner: Well, you may as to matters of no substantive effect, dates, spellings, and so on.

Mr. Yeates: Yes, that standard motion.

Trial Examiner: So far as I know, nobody has ever been prejudiced by its granting.

Do you object to it, Mr. Smith?

Mr. Smith: I would like to test it.

Trial Examiner: I will reserve ruling on your motion, Mr. Smith, all of them, until I have studied the transcript. I will grant General Counsel's motion to conform.

What about filing briefs?

Do you care to file a brief, Mr. Smith?

Mr. Smith: I think so. [267]

Trial Examiner: All right.

Mr. Smith: And we would like plenty of time after receipt of the transcript.

Trial Examiner: Well, I can't give you too much time, but I can give you 30 days.

Mr. Smith: I think 30 days would be sufficient, provided we get the transcript within 10 days.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Then, I will allow 35 days from the close of the hearing here today for the receipt of briefs, which should be addressed to me, William E. Spencer,

Trial Examiner, Division of Trial Examiners, NLRB, 630 Sansome Street, 206 U. S. Appraisers Building, San Francisco. If you get all of that address correct, I should get the briefs, and I would be glad to have them, be glad to consider them.

If you care to file one, Mr. Yeates, I will be glad to have that, too.

Thank you for your courtesy and cooperation. The hearing is closed.

(Whereupon, at 12:50 o'clock, p.m., Tuesday, February 25, 1958, the hearing in the above-entitled matter was closed.) [268]

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the Twentieth Region in the matter of Morrison-Knudsen, Inc. Henry J. Kaiser, and B. Perini & Sons, d/b/a Kings River Constructors, and M. E. Tuttle, an individual, Case No. 20-CA-1288, Fresno, California, February 24-25, 1958, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

FRANK J. McCABE,

Official Reporters,

/s/ By VERNON TELLER,

Field Reporter.

United States Court of Appeals For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
CORPORATION and B. PERINI & SONS, d/b/a Kings
River Constructors, a joint venture,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

— and —

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
CORPORATION and B. PERINI & SONS, d/b/a Kings
River Constructors, a joint venture,
Respondents.

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW
DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS
BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS
BOARD TO ENFORCE SAID ORDER AGAINST THE
KINGS RIVER CONSTRUCTORS

INITIAL BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

ALLEN, DEGARMO & LEEDY

By GERALD DEGARMO

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INITIAL BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

ALLEN, DeGARMO & LEEDY

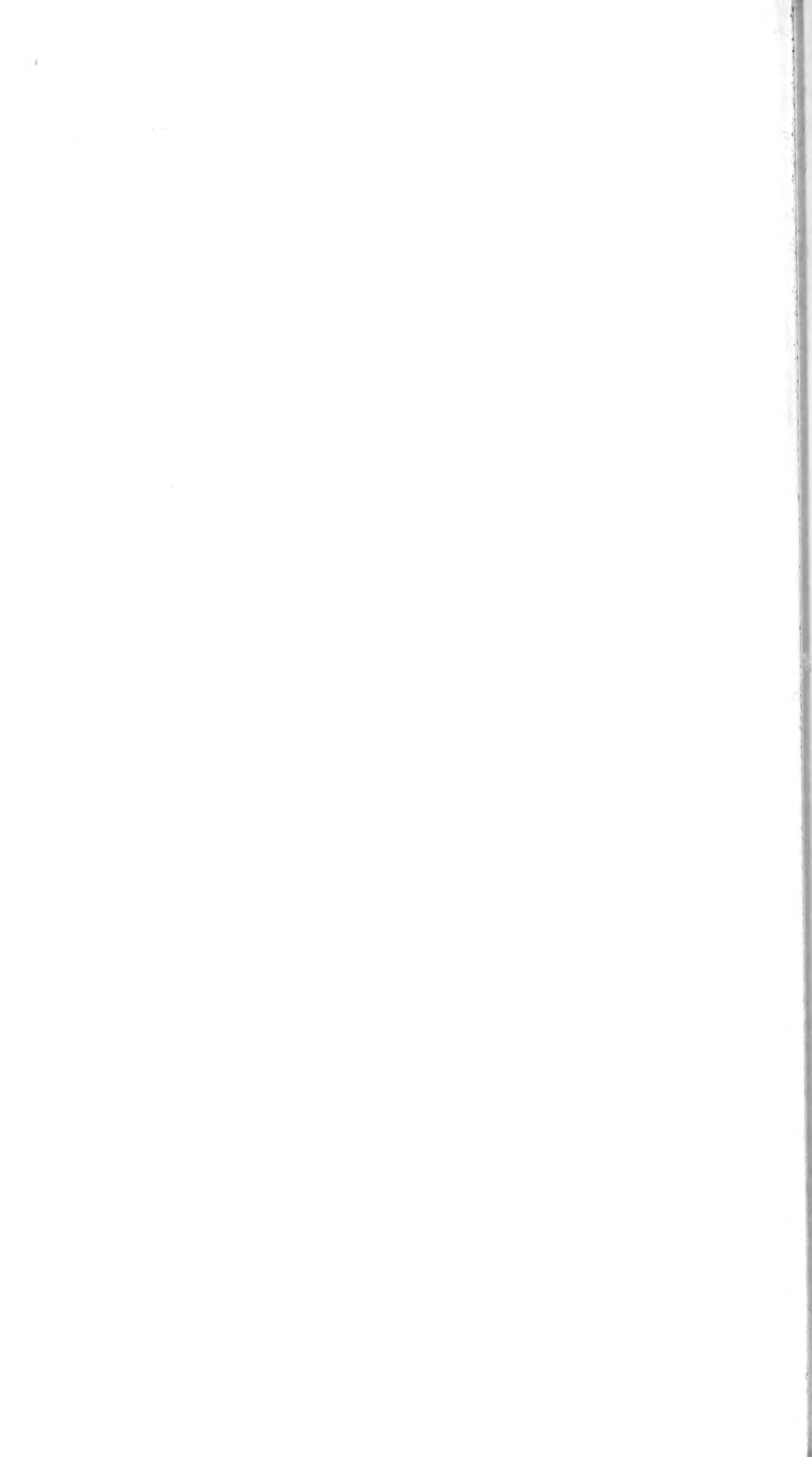
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United States Court of Appeals

For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J.
KAISER, MACCO CORPORATION and B.
PERINI & SONS, d/b/a Kings River Con-
structors, a joint venture, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MORRISON-KNUDSEN, INC., HENRY J.
KAISER, MACCO CORPORATION and B.
PERINI & SONS, d/b/a Kings River Con-
structors, a joint venture, *Respondents*.

No. 16301

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW
DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS
BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS
BOARD TO ENFORCE SAID ORDER AGAINST THE
KINGS RIVER CONSTRUCTORS

INITIAL BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

I. JURISDICTION

On October 17, 1958, the National Labor Relations Board entered a Decision and Order in their Case No. 20-CA-1288 against the Kings River Constructors, a joint venture, affirming the Intermediate Report and adopting the Findings, Conclusions and Recommenda-

tions of the Trial Examiner contained in that Report (Tr. 43-46). This case arose out of an alleged unfair labor practice charge in violation of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C.A. 141 (Tr. 1-7).

The petitioners, as aggrieved persons, invoke the jurisdiction of this court to review the Board's Order and vacate, set aside or modify that Order under the authority of Section 10(f) of the Act, 61 Stat. 146; 29 U.S.C.A. § 160.

Kings River Constructors were engaged in the construction of an installation in the Kings River Canyon in California, sixty miles from Fresno, at a total cost in excess of \$1,500,000.00 and made purchases from outside the State of California in excess of \$500,000.00 at times here material, and were therefore engaged in interstate commerce subject to the Act, all as alleged in Paragraphs II and III of the Complaint (Tr. 4, 5) and admitted by Petitioners' Answer (Tr. 7, 8).

II. STATEMENT OF THE CASE

In February, 1952, Kings River Constructors were engaged in construction of a power house for the Pacific Gas & Electric Company of California at a place called Black Rock in the Kings River Canyon, approximately sixty miles east of Fresno, California. They maintained an office in Fresno as well as at the job site.

At the same time, there was another joint venture conducting construction referred to as the Wishon Dam, approximately twenty miles from Black Rock.

This joint venture was named Morrison, Walsh & Perini. Morrison-Knudsen Company, Inc. was the sponsoring partner of each of these ventures, although the projects were not otherwise related.

Mr. Manfred E. Tuttle (on whose behalf the Complaint was issued in this case), age 70 (Tr. 86), had been working for the past few years as a warehouse clerk, including some employment on other projects in which Morrison-Knudsen was interested (Tr. 66). He had quit work on one such project in November, 1956, and had remained unemployed while completing some dental work at his then residence in Stockton (Tr. 95, 98).

Mr. Jack Sharp was an old friend of Mr. Tuttle's and was also a construction warehouseman with whom Mr. Tuttle had worked on other jobs. At the time of the first events of this case, Mr. Sharp held a job as warehouseman with petitioners at Black Rock.

On Friday evening, February 22, 1957 (Tr. 100) Mr. Tuttle drove from Stockton to Friant where Mr. Sharp was living. This trip was a surprise visit to Mr. Sharp, as Mr. Tuttle had not previously contacted him (Tr. 99, 145). By coincidence, on the same day that Mr. Tuttle arrived, Mr. Sharp, who had been on loan from the Wishon Dam Project, was advised by the Project Manager at Wishon Dam that he was to be transferred back to that project from Black Rock. At the same time, Mr. Perkins advised Mr. John E. Atkins, Warehouse Manager at Black Rock, to get someone to replace Sharp (Tr. 136). Upon finding Tuttle at his home after returning from work that night, Mr. Sharp advised Tut-

tle of the pending transfer and suggested there might be a job opening for Tuttle in Sharp's place at Black Rock.

The next morning, Saturday, February 23, Mr. Sharp went to Fresno to see Mr. Perkins about when he was to go to Wishon, and took Mr. Tuttle along to inquire about his getting the job at Black Rock (Tr. 138). On this occasion, Mr. Perkins was anxious to obtain Sharp at Wishon and felt that the suggestion that Tuttle replace Sharp at Black Rock was all right (Tr. 139). However, it is clear that Mr. Perkins had no authority whatsoever over employment at Black Rock, where a Mr. Jack DeLay was Project Manager for the entirely different joint venture (Tr. 142, 172). The jobs did attempt to assist each other and jointly maintained a labor coordinator for procurement of personnel for both jobs at Fresno. This person's name was James Wolcott (Tr. 222-224).

On Monday, February 25, Mr. Tuttle presented himself at the Black Rock Project under the impression that Mr. Perkins was Manager there and that he would or had hired Tuttle to replace Sharp (Tr. 68). Earlier that day, Mr. Tuttle had gone to the Fresno Local No. 431 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, the union to which Mr. Tuttle belonged. Mr. Tuttle advised the union's secretary, a Mr. Al Fudge, that he had been hired for the warehouse job at Black Rock, whereupon Mr. Fudge became very angry and assertedly refused to "clear" Tuttle for the job (Tr. 73-74). Mr. Tuttle then left Fresno and went up to the job site.

On this same Monday, prior to the arrival of Mr. Tuttle, Mr. Sharp had advised Atkins that Mr. Tuttle was available and that it had been suggested that he take Mr. Sharp's place at Black Rock. Mr. Atkins at that time advised Mr. Sharp that another man had been hired for that job (Tr. 140).

Upon Tuttle's arrival, Mr. Atkins advised Tuttle that there must have been some mistake, that Mr. Wolcott had someone coming from Santa Anita for the job and inquired whether Tuttle had his name in the office. Mr. Atkins then suggested that Mr. Tuttle talk to Mr. Wolcott who was at the Black Rock job site. Tuttle advised Wolcott that he thought he had been hired by Mr. Perkins, and Wolcott advised Tuttle that a man had already been called for the job and that Mr. Perkins had no right to put a man on the job at Black Rock anyway (Tr. 76, 77).

Thereafter, Tuttle remained in the Fresno area seeking employment. He was offered a job by Wolcott at Black Rock in late March or early April, but before he was hired, the shifts on which he was to work were terminated and the warehouse crew was reduced, thereby eliminating the job (Tr. 196-197).

From these circumstances and certain other points of testimony noted in the Trial Examiner's Report and which we will discuss more fully when dealing with the argument on errors, the Trial Examiner concluded that the petitioners had refused to employ Tuttle because of an alleged failure to obtain union clearance, and therefore they had violated Sections 8(a)(1) and 8(a)(3) of the Act (Tr. 9 through 26). The Board adopted these

conclusions, entered a broad form cease and desist Order and an Order requiring offer of re-employment and granting a back pay award to Mr. Tuttle, all of which are subject to this Petition to review (Tr. 43, 46). The petitioners duly filed exceptions to the intermediate Report and recommended Order of the Trial Examiner with the Board (Tr. 28-42).

III. SPECIFICATION OF ERRORS

That the following portions of the Trial Examiner's Report, which serve as findings and upon which his conclusions are based, are not supported by substantial evidence on the record considered as a whole:

1. Transcript 12:

"... Perkins, who had known Tuttle on prior construction jobs, advised the latter to get his union card cleared by Teamsters Local 431 in Fresno."

Insofar as it purports to find that Perkins required Tuttle to get permission from Local 431 as a condition of employment by Kings River Constructors.

2. Transcript 13:

"Following his interview with Perkins, at the latter's suggestion, Tuttle went to the Fresno office of Kings River Constructors and put his application on file with James Thomas Wolcott, the labor coordinator for both the Black Rock and Wishon projects. Tuttle testified that Perkins accompanied him to Wolcott's office, and Wolcott being occupied at the time, had Wolcott's secretary register Tuttle's application for the warehouse job at Black Rock."³

³"Perkins did not recall having accompanied Tuttle to Wolcott's office but admitted that he may have done so, and Tuttle was firm in his testimony on the point."

To the extent that this constitutes a finding the application with Wolcott was filed on Saturday and not on the following Monday, and to the Trial Examiner's reference to the firmness of Tuttle's testimony in view of his contradiction of dates, all of which are very material.

3. Transcript 14:

"Fudge did not want to accept the transfer of Tuttle's card from the Stockton local, told Tuttle that he already had more warehousemen than he could do anything with, and refused to clear him for the Black Rock job."

To the extent that this is a finding Tuttle could not get union approval of his asserted job because he was from Stockton, rather than because Mr. Fudge had already committed another man to the job in response to Mr. Wolcott's requisition.

4. Transcript 14-15:

"Atkins testified that prior to February 25 he had been advised by Sharp of the latter's transfer to Wishon, and that Sharp had recommended Tuttle to replace him at Black Rock. Atkins admitted that he thereupon requested Tuttle by name as a replacement for Sharp and testified that he made the request through Weatherman, office manager and Atkins' immediate superior—his usual procedure in obtaining warehouse personnel. Atkins also told Sharp to have Tuttle 'contact' him. He did not know Tuttle personally but knew of him because of work on prior projects. According to Atkins, there was some delay in Tuttle's reporting for the Black Rock job and in the interim the vacancy had been filled by the hiring of one Myers.

This testimony, as will be seen, is not consistent with that given by Wolcott.”

In that it purports to find that Atkins knew of Tuttle’s availability prior to February 25, that Atkins requested Tuttle by name as a replacement for Sharp on February 25, that he told Sharp to have Tuttle contact him on that date, and that there is any material inconsistency with Mr. Wolcott’s testimony, or that Tuttle had ever been considered for the vacancy for which Mr. Myers was hired.

5. Transcript 16:

“According to Wolcott, it was after his interview with Tuttle that he was asked by DeLay, Black Rock project manager, to ‘get him a good warehouseman’,”

To the extent that this is a finding that Wolcott in fact knew of Tuttle’s availability prior to being requested to get a warehouseman to replace Sharp.

6. Transcript 16:

“Obviously, therefore, Atkins’ testimony that Myers had already been hired when Tuttle first approached him about the job, was erroneous, and why, on February 25, he should have advised both Sharp and Tuttle that the job was filled, invites speculation. Respondent’s witnesses provided no explanation.”

In that it purports to find that the date of actual hire of Myers on February 28 is equivalent to the date of commitment of the job to him, and that therefore the job was open when Tuttle applied for it on February 25.

7. Transcript 17:

“Despite his failure to obtain union clearance,

Tuttle continued his efforts to obtain work at Black Rock. He repeatedly saw Wolcott but received no encouragement for future employment.”

As finding that Tuttle could not get a union clearance, that such a clearance was necessary, and that Wolcott gave Tuttle no encouragement for future employment. The Trial Examiner subsequently found that Wolcott offered Tuttle employment (Tr. 18).

8. Transcript 17:

“According to Tuttle, on this occasion Atkins also told him that *he had asked for Tuttle by name to fill the Sharp vacancy and had been advised that Tuttle was not eligible for the job because the union refused to clear him.* Tuttle further testified that Atkins told him he had called Fudge with respect to clearing Tuttle and Fudge had replied that Tuttle was not available for any job at Black Rock.”

As suggesting that Tuttle’s testimony in this regard is credible and as finding that Atkins had either asked for Tuttle to replace Sharp, or had called Fudge with respect to clearing Tuttle.

9. Transcript 17:

“Leon Maples, a warehouse clerk at Black Rock, testified that he overheard Tuttle tell Atkins of his belief that Fudge was responsible for his failure to get the Black Rock job, and heard Atkins reply that he had put in a ‘requisition’ for Tuttle by name before Myers was hired, and that Wolcott said that Tuttle was not available.”

To the extent that this constitutes a finding that Atkins requested Tuttle before Myers was hired and that Wolcott advised Tuttle was not available.

10. Transcript 18:

“Atkins was not a reliable witness, but on the contrary was evasive, and I am reasonably certain, withheld facts within his knowledge on Tuttle’s rejection as a replacement for Sharp.” (Italics ours)

As finding that Atkins intentionally withheld evidence and that such inconsistencies as existed in Atkins’ testimony were caused by anything other than dim recollection of what, to him, were routine employment matters.

11. Transcript 18:

“Both Ryan and Myers were cleared through Local 431.”

As finding that Ryan was cleared through Local 431, and as implying that union clearance was a required condition of employment.

12. Transcript 19:

“. . . Atkins, who was acquainted with Tuttle’s work, asked for Tuttle by name as a replacement for Sharp. Absent an explanation of why he was not informed in the matter, contrary to Wolcott’s testimony, I am convinced that Wolcott had knowledge of Atkins’ recommendation.” (Italics ours)

As finding that Atkins asked for Tuttle as a replacement for Sharp by name on or before February 25, and that Wolcott knew or should have known of this alleged fact.

13. Transcript 20:

“In the case of Tuttle, however, his recommendation was ignored or, at least, not followed, and Myers was hired instead, not on the strength of anybody’s recommendation but through clearance with Fudge.” (Italics ours)

As finding that Atkins requested that Tuttle be employed on February 25, and that his recommendation was then ignored, and as finding that Myers' placement was due to any cause other than routine filling by the union of a placement request.

14. Transcript 20:

"Contrary to Atkins' testimony, and on Wolcott's testimony, *Myers had not been hired at the time Tuttle presented himself at the Black Rock project, nor later when Tuttle applied to Wolcott.* Why was Myers requisitioned for the job through the union, when Tuttle had Atkins' recommendation and was available? I think there can be but one answer. *Tuttle could not get union clearance and had aroused Fudge's antagonism.*" (Italics ours)

As finding in effect that the job for which Tuttle applied on February 25 had not been committed at that time, and that Tuttle was not hired because he could not get union clearance.

15. Transcript 21:

"... *he had requested Tuttle in the first instance and his request had been ignored.*" (Italics ours)

As finding that Atkins had made a request for Tuttle prior to the request in April which was referred to.

16. Transcript 21:

"... his work must be deemed to have been satisfactory inasmuch as *Atkins*, who knew of his work, *requested him . . .*"

As finding that Atkins had made a request for Tuttle prior to the request in April which was referred to.

17. Transcript 21:

“Perkins advised Tuttle to clear with Fudge because this was the ‘usual procedure,’ and *Perkins was in a position to know.*”

As finding that Perkins required union clearance as a condition of employment, that Perkins’ statements were material to a charge involving Kings River Constructors, and as finding that Perkins was in a position to know the usual procedure for Kings River Constructors.

18. Transcript 21:

“... *I think he (Atkins) was in a position to know and did know from experience that this (union clearance) was a customary requirement.*” (Italics ours)

As finding that Atkins was in a position to know the hiring procedure of Kings River Constructors, did know such procedure, and that in any event, his statements in this regard are admissions against petitioners.

19. Transcript 22:

“... *its denial of a job to Tuttle because the latter incurred Fudge’s displeasure and was therefore unable to obtain union clearance, was discriminatory and violative of Section 8(a) (1) and (3) of the Act. It is so found.*” (Italics ours)

As finding that Tuttle was denied employment with petitioners on February 25, or any other time, because he could not obtain union clearance, and as finding that any conduct of petitioners was in violation of section 8 (a) (1) and (3) of the act.

20. The Trial Examiner erred in failing to find:

A. That on Friday, February 22, the need for a re-

placement for Sharp was known and forwarded through hiring procedures to Wolcott (Tr. 136).

- B. That Wolcott, prior to Monday, February 25, requested a warehouseman from Fudge, who said he would get a good one (Tr. 275).
- C. That this commitment was relayed to Atkins by Wolcott prior to Sharp telling Atkins of Tuttle's availability, and that for this reason Atkins advised Sharp that another man was coming for the job (See Argument Section 1).
- D. That Atkins did not advise Sharp to contact Tuttle on Monday, February 25, because he had already advised Sharp that the job was filled when the matter was first mentioned and the man to fill the job was actually hired three days later, on February 28.

21. That the trial court erred in imputing to Kings River Constructors the actions and statements of Bertam Perkins, who was not an employee of this petitioner.

22. That the Trial Examiner erred in failing to disregard the testimony of John Atkins concerning hiring practices, in view of Trial Examiner's own acknowledgment that Atkins was not qualified to testify on the subject (Tr. 219-220).

23. The Trial Examiner erred in failing to sustain the following objection:

"MR. SMITH: I am going to object to the reading from these notes as hearsay. I think Mr. Wolcott has not been presented these notes for personal inspection. He has not signed them. They do not constitute a signed statement. Mr. Schneider has not been called here as a witness to relate his conversation. I think it is hearsay."

and he further erred in ruling that it was proper to interrogate a witness with statements allegedly made by him but in fact prepared by a third person not in the words of the witness.

24. That all provisions of the Board's Order against petitioners are not based on supportable findings of fact, and should be vacated.

25. That the broad form of Section 1 (b) of the Board's Order is not supported by necessity shown in the record (Tr. 44).

26. That the Board erred in directing an offer of re-employment to Mr. Tuttle in view of the uncontradicted evidence and finding that a position was offered, and then abolished for economic reasons (Tr. 45).

27. That the provisions of 2 (a) of the Board's Order are contrary to law in that they are not conditioned upon the availability of a substantially equivalent position.

28. That the notice requirement of 2 (b) of the Board's Order should be vacated or modified in accordance with final disposition of the case (Tr. 45).

IV. ARGUMENT

1. Trial Examiner's Entire Conclusions Are Predicated on Finding that Warehouse Manager Requested that Tuttle Be Hired at Time Tuttle First Applied for a Job, and Uncontradicted, Binding Evidence Conclusive that This Finding Is Contrary to Fact

For purposes of judicial review, Section 10 (f) of the Act provides:

“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.” 29 U.S.C.A. § 160.

Petitioners have this provision well in mind, and it is not their purpose to reargue in this proceeding those matters upon which the Trial Examiner's findings are in fact based on substantial, although conflicting evidence. However, petitioners submit that as to the crucial findings that Mr. Tuttle's hire was recommended at the time he first applied at the Black Rock project for work on Monday, February 25, 1957, there is not only no substantial evidence to support this finding, but the evidence that Mr. Tuttle's hire was not recommended or requested on this occasion is conclusive. Yet, by his own statements, the Trial Examiner made this alleged fact the basis for an entire series of factual inferences against petitioners upon which a finding of violation of the Act is based.

We submit that the standard for judicial review particularly applicable to this case is contained in the leading case of *Universal Camera Corp. v. National L.R. Bd.* (1951) 340 U.S. 474, 95 L.Ed. 456, in which the following is quoted on page 487:

“Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into

account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

In the findings described in Specification of Errors, No. 4, 5, 6, 8, 9, 12, 13, 14, 15, and 16, the Trial Examiner asserts as a fact that on February 25, Atkins asked for Tuttle by name as a replacement for Sharp (Tr. 18) and further concludes that Wolcott was lying when he denied knowing on February 25 of any request by Atkins for Tuttle, "absent an explanation of why he (Wolcott) was not informed in the matter, . . . " (Tr. 19).

The explanation is supplied by the testimony of the general counsel's own witnesses, Mr. Tuttle and Mr. Sharp. We refer particularly to Mr. Sharp's testimony as a disinterested witness, unemployed at the time of the hearing, a friend of Mr. Tuttle's since 1953 and the person who recommended Tuttle for the warehouse job. Mr. Sharp appeared from the record to have the clearest and most consistent recollection of events of any of the witnesses in the case.

We submit that the following chronological sequence of events, based principally on Mr. Sharp's testimony as corroborated by Mr. Tuttle and others is established beyond reasonable doubt, and any conclusion inconsistent with these facts cannot be sustained.

Friday, February 22, 1957

Mr. Sharp testified that on this date, while Sharp was at work on the Black Rock project, Mr. Perkins of the Wishon Dam project had advised Mr. Atkins

that he, Mr. Perkins, was ready to have Sharp back at Wishon and to get someone to replace him (Tr. 136, 137). Mr. Sharp knew all winter that he was going back to Wishon, but did not know when until that evening (Tr. 137). Furthermore, Mr. Sharp did not at that time know Tuttle was available until he got home and found Tuttle waiting. Mr. Tuttle's visit was a *surprise* (Tr. 145 Testimony of Jack Sharp):

“Q. As a matter of fact, Mr. Sharp, didn't you talk with John Atkins some three to four days before this Monday in question—before Monday, the 25th of February, I believe the date is—didn't you talk with John Atkins concerning Mr. Tuttle?

A. No. I didn't talk with him until after I came down that (96) Friday, after I talked with Bert Perkins—or Bert was there in the warehouse.

Q. That is the first you knew that you would be going to Wishon—

A. I didn't know whether Mac existed, even, then or not.

Q. And then that Friday Mr. Tuttle's visit was a surprise to you?

A. That is right.

Q. And after you talked to Bert Perkins that Saturday morning, then the next morning when you went back to work up at the warehouse—

A. Right.

Q. You talked with Atkins about Mr. Tuttle taking your place?

A. Yes, sir.”

This is corroborated by Mr. Tuttle's own testimony (Tr. 99 Testimony of Manfred E. Tuttle):

“Q. Had you had correspondence or had you called Mr. Sharp in the meantime?

A. No, I never called Mr. Sharp.

Q. When did you come to Fresno?

A. I came down just to visit him because he was a friend of mine. I had known him, you know, up in that—

Q. When was that, that you first came down to visit him, after leaving Beardsley?

A. It was at the time I applied here for a job. I got down here, and he told me he was being transferred and that there would be a job up there where he was. So I applied for this one.”

Obviously, Mr. Sharp could not have recommended Mr. Tuttle to Atkins on or prior to this date because (1) he did not know his job would be open until that date, and (2) he was not aware of Tuttle's availability or whereabouts.

Saturday, February 23, 1957

On Saturday morning, Mr. Sharp went to see Mr. Bert Perkins in Fresno to see just when Mr. Perkins wanted him to go to Wishon. He took Mr. Tuttle along to inquire about the Black Rock job (Tr. 138).

There is no testimony of any contact by either Mr. Perkins or Mr. Sharp with Atkins on this date in connection with hiring Tuttle.

The Trial Examiner (in Specification of Error No. 2 found that following the Perkins interview, on the same day, Tuttle put in an application at the Kings River Construction Office (Tr. 13). It is true that Tut-

tle so testified (Tr. 71). Although the Trial Examiner found his testimony "firm" on this point, it appears that Mr. Tuttle was even more "firm" in placing the same event on Monday, February 25:

"Q. When did you next contact the office at Kings River Constructors?

A. I went right to the office Monday morning, and I don't know whether that's the morning that Mr. Perkins took me in to Mr. Wolcott's office and told me to give my name to the clerk—(55) to give my name to the lady that was in there.

Q. Did Mr. Perkins meet you at the door?

A. He met me outside. He saw me standing out in the hall and come out of his office and took me in there.

Q. Come out of Mr. Wolcott's office?

A. Yes, that is right.

Q. What did Mr. Perkins say at that time?

A. He said, 'Register him for the job up there.' That is what he told her.

Q. He told the girl in the office at that time?

A. That is right.

Q. Did you see Mr. Wolcott?

A. Not that morning.

Q. Not that morning?

A. I didn't see him until I got out to the job. He was out on the job.

Q. Then, did you see Al Fudge that day?

A. Yes. That's the day I seen him, that day, and asked him about it.

Q. When did you see Al Fudge?

A. Before I went out.

Q. To the job?

A. Yes."

From this testimony, the witness was quite clear that the contact at Kings River Constructors Office was on Monday morning, February 25.

Sunday, February 24, 1957

Tuttle spent Saturday afternoon and Sunday bringing his trailer from Stockton, arriving Sunday night (Tr. 107). Again there is no evidence of any contact between Sharp, Tuttle or anyone else with Mr. Atkins in connection with Tuttle's employment.

Monday, February 25, 1957

On this date, for the first time, by his own testimony and as a matter of circumstantial necessity establishing the first opportunity, Mr. Sharp saw Mr. Atkins at the Black Rock job site and advised him that Mr. Tuttle was available, to which Atkins answered that the job had been filled:

"Q. Did you have any discussion with Mr. Atkins concerning Mr. Tuttle *before the time* Mr. Tuttle arrived at the project?

A. I did.

Q. What was that conversation between you and Mr. Atkins, as best you can recall?

A. Well, it was nothing out of the ordinary, I don't think, I just told him that at the conversation Bert and Mac and me had down at the Fresno Hotel. *And he informed me at that time that there was another man hired to take my place.*" (Emphasis ours)

Petitioners assert that this evidence is conclusive as to when Atkins first learned of Tuttle availability. He could not have previously requested Tuttle or known of any dispute that Tuttle might have had with Mr. Fudge of the union, sixty miles away in Fresno. Yet Mr. Atkins promptly, and at that moment, advised Mr. Sharp that he had another man coming. The other man, of course, was the warehouseman which Mr. Wolcott had requisitioned from Mr. Fudge at the request of Jack DeLay, Project Manager at Black Rock (Tr. 275). This would be in accordance with standard procedure (Tr. 199). It was known on Friday at Black Rock that Sharp had to be replaced, but no one there knew of Tuttle until the following Monday.

Tuttle arrived later at Black Rock and was advised by Atkins that Wolcott had someone coming from Santa Anita (Tr. 76). There was no mention of union difficulty in this conversation. Tuttle was referred by Atkins to Wolcott, who happened to be on the project that day, at which time the following conversation took place (Tr. 76, 77).

“A. ‘Well,’ he says, ‘you had better go up and see Mr. Wolcott. He is up at the office.’ You know, their main office is some distance from the warehouse. And he said, ‘You had better go up there and see Mr. Wolcott.’ So I went up and I—we had to wait quite awhile, and finally somebody identified his car for me and I just waited outside until he came out and I talked to him out in the ? ? ??, as he was getting into his car. And he said, ‘Well,’ he says, ‘I have already called a man for that job.’ And I asked, I told him that Mr. Perkins had told

me to go up there. And he said, 'Well, I have called a man for that job.'

Q. All right. Then what happened?

A. When I asked him, he says, 'Well, Mr. Perkins has no right (21) to put a man on this job, anyway.' He says, 'He is just over at Wishon.' So I said to him, 'Well, it seems rather strange to me that a man can take a man off of a job but can't put another one in his place. He must have some authority here.'

Q. Was there any further conversation?

A. No. He says, Mr. Wolcott said, 'Well, that is the way it is. He is just over Wishon.' And from then on, well, I just left."

There is again no mention of union clearance and it appears from the record that this was Wolcott's first contact with Mr. Tuttle (Tr. 282). According to the only evidence available, Wolcott did not learn of Tuttle's problems with Fudge until the following day, Tuesday, February 26 (Tr. 228).

As previously stated, finding that Atkins and Wolcott knew of Tuttle's application, knew that he would not be cleared by the union and had this knowledge on Monday, February 25, when the matter was first mentioned by Sharp, is essential to the inferences and conclusions from which the Trial Examiner makes his ultimate finding that Mr. Tuttle was not hired because he could not get union clearance. Such a conclusion could be reached only by completely ignoring the foregoing testimony, which neither the Trial Examiner, the Board nor the reviewing court are entitled to do under the doctrine of the *Universal Camera Corporation* case,

supra, and instead relying upon certain testimony of Mr. Wolcott which is inconsistent with the other evidence in the case, and particularly the evidence hereinabove set forth.

The extent that Mr. Wolcott's testimony (Tr. 274-275) tends to establish that arrangements for hiring Mr. Myers were not made until after he had been contacted by Mr. Tuttle, we believe this in part is faulty recollection and in part a confusion over the fact that Myers was actually hired on Thursday, February 28, 1957 (Tr. 262), although the call to the union which he answered was obviously made at an earlier date. He was the only person to whom both Mr. Wolcott and Mr. Atkins could have been referring when they talked to Mr. Tuttle on Monday, February 25, although Myers' exact identity was then unknown. Having once called the union for an employee, an employer is certainly not free to fill the vacancy with other applicants during the period when the union is obtaining someone to fill the position. A misunderstanding in this regard may possibly have been the cause of conflict between Mr. Tuttle and Mr. Fudge. Counsel for the Board did not see fit to call Mr. Fudge, and obtain direct evidence on this issue, but rather relied upon inference and hearsay. We submit that this court in the case of *National Labor Rel. Bd. v. Amalgamated Meat Cutters* (C.A. 9, 1953) 202 F.2d 671, has held that agency findings cannot be based upon hearsay alone. *Willapoint Oysters v. Ewing*, C.A. 9, 174 F.2d 676.

We recognize that it is unusual for the employer to suggest that his own witness is in error and that the testimony on behalf of the Board is correct, but

on this issue such a conclusion is compelled. It is quite likely that Mr. Wolcott, who is constantly dealing with new hires and personnel problems, might be uncertain as to a particular time sequence, when asked to recall the chain of events one year later. To him, it was a routine event of his work. Yet in effect the Trial Examiner has based his whole case on this one portion of testimony, notwithstanding its inconsistency with the other established facts of the case (Spec. of Error 19).

To answer the Trial Examiner's request for an explanation of why Wolcott did not have knowledge of Atkins' recommendation, the answer is that Atkins made no such recommendation.

We are aware that Mr. Atkins also testified that Mr. Tuttle had been recommended to him by Mr. Sharp approximately four days before Monday, February 25 (Tr. 186), but again, in view of the inconsistency with the testimony of Mr. Tuttle and Mr. Sharp, Mr. Atkins' testimony must be deemed in error and based upon inaccurate recollection. Mr. Atkins does recall making one requisition for Mr. Tuttle when the warehouseman, Mr. Maples, was married (Tr. 195). As a result of this requisition, Mr. Wolcott contacted Mr. Tuttle and he would have been employed but for termination of the shift by the District Manager (Tr. 196, 230, 278). It should be noted that the next opening after Mr. Myers was hired was when he left and a Mike Ryan, who had worked with Mr. Atkins for over ten years, was specifically requested by Mr. Atkins (Tr. 193, 194). The only other opening on the job was when Mr. Maples left, and admittedly Mr. Tuttle was requested for this

job, although it never materialized. Accepting petitioners' contention that Mr. Myers was requisitioned from the union before Mr. Tuttle's availability was known (Spec. of Error 20) and agreeing that Mr. Atkins' efforts to get Mr. Ryan all the way up from Los Angeles to fill the next vacancy was motivated by a particular desire for this employee, then the only job for which Tuttle could have been considered was the replacement of Mr. Maples. Consequently, to whatever extent the hearsay evidence concerning Mr. Fudge's position might be considered with reference to "clearing" Mr. Tuttle, the evidence is conclusive that Mr. Tuttle in fact was hired for the first job that became available after his application, even though it was later terminated before he actually went on the work.

2. Legal Errors by Trial Examiner and Consideration of Unsubstantial Evidence Destroys Foundation for Trial Examiner's Findings.

A. In Specification of Errors Nos. 1, 17 and 21, the Petitioners assign error to the consideration by the Trial Examiner of acts and statements of Bertram Perkins, on which the Examiner has made certain findings and for which the Petitioners are held responsible. Even if Perkins did tell Mr. Tuttle to clear with or through the Union, or whatever suggestion was in fact made in connection with the Union, for this to be material, Perkins would have to have been a responsible supervisor of the Kings River Constructors. *Poultry Enterprises, Inc. v. N.L.R.B.* (CA 5, 1954) 216 F.2d 798. Yet in fact, Bertram Perkins was not even an employee of Kings River Constructors. The mere fact that

the two joint ventures had common sponsoring partners does not make the parties identical. Perkins' testimony as to either usual procedure or recommendations to Mr. Tuttle should have been disregarded.

B. In the same manner, as set forth in Specification of Errors 17 and 22, the Trial Examiner finds from Mr. Atkins' testimony that Union clearance was customary, notwithstanding Mr. Smith's objection to such testimony at page 201:

"MR. SMITH: I will object on the ground that I think the direct examination brought out, and was limited in that sense, that Mr. Atkins had no dealings directly with the union and didn't know and had no occasion to know it.

TRIAL EXAMINER: I believe all he is being asked for is what his understanding of the procedure was. And what weight that would have I don't know."

The weight referred to by the Trial Examiner was sufficient in his mind to warrant reference in his opinion (Tr. 21) although he himself pointed out that there was a lack of showing of Atkins' capacity for knowledge concerning Union relationship (Tr. 219, 220) which lack was not cured.

C. In Specification of Error 3, 7, 11 and 19, reference is made to findings which are entirely or substantially based on hearsay, and unsupported by corroborating evidence. It is error to base factual findings on such unsubstantial evidence standing alone, as it does in the present case. *N.L.R.B. v. Amalgamated Meat Cutters, supra.*

As an example, in Specification of Error 3, the Trial

Examiner makes findings of fact concerning Fudge's participation in Tuttle's employment, based entirely on Tuttle's testimony.

In Specification of Error 7, the Trial Examiner finds that Tuttle failed to receive Union clearance, again based entirely on Tuttle's testimony of what Fudge said, yet Fudge was not a party for whom the Kings River Constructors were responsible, nor was he even a witness. His out of Court statements might be offered for other purposes, but they cannot be offered as proof of the truth of whether a Union clearance was granted.

In Specification of Error 18, reference is even made by the Trial Examiner to Tuttle's own self serving statement that he thought Fudge was responsible for his not getting a job.

As an example of the extent to which hearsay was used in the opinion, in Specification of Error 11 a finding is made that both Mr. Ryan and Mr. Meyers were cleared through the Union. Meyers was cleared because the Union sent him out, but the finding as to Mr. Ryan clearing through the Union is based on the following testimony of Mr. Atkins:

(Tr. 211 Testimony of Mr. Atkins)

“Q. Was Mr. Ryan cleared through the union, too?

A. I would imagine, yes, I would imagine so.

Q. That would be your impression, or there again had you —

A. He has always carried a union card.”

(See also Tr. 239)

Any single one of these items might not be prejudicial, standing alone, but when used as a basis for several of the Trial Examiner's findings and when considered with the absence of direct testimony on the issues and the fundamental conflict between the evidence and the Trial Examiner's finding as set forth in paragraph 1 of the argument, it is submitted, as asserted in Specification of Errors 19 and 24 that such evidence is insufficient to support an inference of violation of the Act, and the Trial Examiner's ultimate findings are admittedly based on inference. *National Labor Relations Bd. v. Fox Manufacturing Co.* (CA 5 1956) 238 F.2d 211. The introduction of such evidence with the other evidence in the case has created a record of such uncertainty and conflict as to times and circumstances as to deprive much of the substantial evidence which does exist of probative value. As stated in Specification of Error 23, the Trial Examiner even went so far as to permit the attempted interrogation and impeachment of a witness with the use of someone else's out of Court notes, when that person was not available. The net result is the inconsistency of the Trial Examiner's findings with the Government counsel's own evidence and those facts which are clearly established.

3. The Form of the Board's Order Is Too Broad in Scope and Lacking in Certainty.

The permissible scope of a Board order was considered in the leading case on this issue of *National Labor Rel. Bd. v. Express Pub. Co.* (1941) 312 U.S. 426, 85 L.ed. 931. In that case, the court stated that the basic reason for restricting the scope of a Board's Cease

and Desist Order was that alleged violations of the Act, not in controversy and not similar or fairly related to the unfair labor practice found, should not be tried by contempt proceedings.

The case points out that the power to issue an injunction does not justify an injunction broadly to obey a statute, and further points out that all types of future labor relations are not to be indefinitely conducted at the peril of contempt summons. The court then established the following criteria governing the scope of a Cease and Desist Order, page 937 (L.ed.):

“We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.”

In *May Dept. Stores Co. v. National Lab. Rel. Bd.* (1945) 326 U.S. 376, 90 L.ed. 145, the court struck from the order the phrase “in any other manner,” and stated that the test was whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it from continuing to engage in unfair labor practices.

In *Lion Oil Company v. National Labor Relations Board* (CA 8, 1957) 245 F.2d 376, the court, in striking this portion of the Cease and Desist Order which constituted a blanket restraining order, held, at page 380:

“Before such a sweeping mandate be issued, there must be evidence that the employer is guilty of consummate disregard for other provisions in the Act or that there is high likelihood of future violation.”

For the same reasons this court has modified or stricken such provisions in the cases of *National Labor Relations Board v. Mason Mfg. Co.*, 126 F.2d 810; *National Labor Relations Board v. Geigy Co.*, 211 F.2d 553; *National Labor Relations Bd. v. Cowles Pub. Co.*, 214 F.2d 707; and *National Labor Relations Bd. v. Lamar Creamery Co.*, 246 F.2d 8.

It would appear to be quite clear that the single incident in the present case, if it amounts to anything, certainly does not amount to a consummate disregard for the Act. Yet the Board continues to follow its standard custom of issuing a broad form order, as contained in Section 1(b) (Specification of Error 25) and supporting the order by reference to the particular unlawful labor practice found with a recitation “We believe that the respondents repeating the commission of the violation involved herein in the future may be anticipated by reason of its conduct herein” (Tr. 44) when in fact there is no reason whatsoever from the evidence or otherwise to anticipate such violation, and in any event a similar violation is restrained by paragraph 1(a) of the proposed order.

4. Provision for Offer of Re-employment and Payment of Back Wages Should Be Conditioned on the Duration and Availability of a Position for Which Tuttle Is Qualified with the Petitioners.

A. In Specification of Error 26, it is contended that as it appears from the record that there was no position open for Mr. Tuttle after the reduction in April, there is no basis for a present offer of re-employment.

B. As stated in the Specification of Error 27, an offer of re-employment should be conditioned specifically in the order upon the existence of an appropriate position. The Black Rock project has in fact been completed and the joint venture composed of petitioners is no longer physically operating.

CONCLUSION

The Trial Examiner has found that *prior* to the time Sharp first advised Atkins of Tuttle's availability on Monday, February 25:

1. Atkins had requested through his supervisors that Tuttle be hired.
2. Atkins had told Sharp to have Tuttle get in touch with him.
3. Atkins had told Wolcott he wanted Tuttle.
4. Atkins was advised that Tuttle was not available for hire because the union had refused clearance.
5. Atkins' recommendation of the hire of Tuttle had been ignored.

Under any view of the evidence, the above findings simply cannot be, yet without these findings the entire

reasoning and basis for the Trial Examiner's opinion is destroyed.

For this and the other reasons set forth herein, we request an order of this court setting aside and denying enforcement to the Board's Order and Decision.

Respectfully submitted,

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No. 16301

**In the United States Court of Appeals
for the Ninth Circuit**

**MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
CORPORATION, AND B. PERINI & SONS, D/B/A KINGS
RIVER CONSTRUCTORS, PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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In the United States Court of Appeals for the Ninth Circuit

No. 16301

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
CORPORATION, AND B. PERINI & SONS, D/B/A KINGS
RIVER CONSTRUCTORS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation,¹ and B. Perini & Sons d/b/a Kings River Constructors (herein referred to as Morrison-Knudsen), pursuant to Section 10(f) of the National Labor Relations Act, as amended² (hereinafter called

¹ Although absent from the petition for review, the Board includes the Macco Corporation among the petitioners to conform with its decision and order and cross-application for enforcement.

² 61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Sec. 151, *et seq.* Relevant portions of the Act appear in Appendix, *infra*, pp. 20-22.

the Act), to review and set aside an order of the National Labor Relations Board (R. 43-48) issued against petitioners on October 17, 1958, pursuant to Section 10(c) of the Act. The Board in its answer to the petition has cross-petitioned for enforcement of its order (R. 55-57). This Court has jurisdiction of the proceeding under Section 10 (e) and (f) of the Act, the unfair labor practices having occurred in the general vicinity of Fresno, California, within this judicial circuit. The Board's decision and order are reported at 121 NLRB No. 179.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact ³

The Board found that petitioners violated Section 8(a) (3) and (1) of the Act by refusing employment to M. E. Tuttle because of his failure to obtain clearance from Local 431 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter referred to as Teamsters or Union). The Board relied upon the following evidentiary facts.

A. Background

During the period here relevant petitioners were engaged in the construction of a powerhouse on the Kings River, known as the Black Rock project, some 60 miles outside of Fresno, California (R. 10-11; 179-180, 226, 176). The Morrison-Knudsen Company,

³ The Board adopted the findings, conclusions, and recommendations of the Trial Examiner (R. 43). In the statement which follows, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

as the sponsoring partner of the project, was responsible for assembling the work crew and settling higher-level problems (R. 11; 176, 179-180, 265). Some of petitioners also participated in another joint venture known as the Wishon Dam project about 20 miles from Black Rock (R. 12, 13; 142-143, 173, 223-224). The Morrison-Knudsen Company was also the sponsoring partner at Wishon Dam (R. 175-176, 265-266). While both projects had its own project manager in charge of personnel, there was an exchange of employees between the two projects (R. 12, 13; 142-144, 145-146, 138).

To facilitate the hiring procedure and maintain harmonious relations with the local unions, both projects employed James Thomas Wolcott, as labor coordinator, with offices in Fresno (R. 13, 22; 224-226, 232-233, 236-237). Preliminary to starting the Black Rock project, Wolcott met with local union representatives, including Al Fudge, secretary of Local 431 of the Teamsters, to discuss with them manpower requirements and contemplated conditions of employment (R. 22; 232-233, 236-237, ~~Tr. 195-196~~).

B. The unfair labor practices

M. E. Tuttle had worked for several years as a warehouse clerk on Morrison-Knudsen projects⁴ in Oregon and California (R. 11; 66, 87-88). In November 1956, he quit work at one of these projects near Sonora, California, to have some dental work done at Stockton (R. 11; 66, 87-88, 95, 86, 98). At

⁴ The record does not indicate whether any of the petitioners other than Morrison-Knudsen participated in these projects.

that time, he was a member of Teamsters' Stockton Local 439 (R. 11; 66, 87-88).

Thereafter, when Tuttle started looking for work, he learned from a friend, Jack Sharp, then employed at Black Rock as a warehouse clerk, that Sharp was about to be transferred to petitioners' Wishon Dam project (R. 11-12; 68, 98-100, 135-136). Sharp suggested that Tuttle might replace him at Black Rock (R. 12; 67-68, 102, 138).

On the next day, February 23, 1957, Sharp and Tuttle went to Fresno where they interviewed Perkins, project manager at Wishon Dam, who had arranged for Sharp's transfer (R. 12; 68-69, 102, 136, 174-175, 177, 180-181). Sharp recommended Tuttle as his replacement at Black Rock and Perkins, who had known Tuttle on prior construction jobs and had observed his work, assumed that Tuttle would fill the vacancy (R. 12, 14; 103, 138-139, 172-173). He advised Tuttle to get his union card cleared by the Teamsters' Local 431 in Fresno, and warned Tuttle that he might have trouble with Al Fudge, secretary of Local 431, in having his card transferred from the Stockton local (R. 12; 71, 108, 138-139, 177-178). Perkins told Tuttle to present himself at Black Rock the following Monday (R. 12-13; 71). On the basis of this interview with Perkins and the knowledge that Perkins had been instrumental in arranging for Sharp's transfer to Wishon Dam, Tuttle assumed that Perkins was actually assigning him to the job (R. 13). Perkins' actual authority in recruiting personnel, however, was limited to the Wishon Dam project (R. 13; 178).

Following his talk with Perkins, and at the latter's suggestion, Tuttle went to the office of Labor Coordinator Wolcott in Fresno to place his application on file (R. 13; 71-72, 227).⁵ Perkins went to Wolcott's office with Tuttle and, because Wolcott was absent or occupied, had Wolcott's secretary register Tuttle's application for the warehouse job at Black Rock (R. 13-14; 72, 107-108).

On the following Monday morning, February 25, Tuttle went to the Teamsters' office in Fresno where he saw Fudge, Local 431's secretary (R. 14; 72-73, 133, 108). He handed Fudge his union card and told him that Perkins had directed him to report for work at Black Rock that day (R. 14; 73-74). Fudge became very angry. He refused to accept the transfer of Tuttle's card from the Stockton local and clear him for the Black Rock job (R. 14; 73-74, 109-110). He told Tuttle that the Union already had more warehousemen than were needed (R. 14; 73, 109).

Despite his failure to get union clearance, Tuttle went to the Black Rock project that afternoon (R. 14; 74-75, 154-155). On the project, Sharp introduced him to John E. Atkins, the warehouse manager, who told Tuttle that "there must be some mistake" because Labor Coordinator Wolcott had another man coming

⁵ There was a considerable exchange of employees between the Black Rock and Wishon Dam projects and while each project had its own manager in charge of personnel, they jointly employed the Labor Coordinator and there was close cooperation between the two projects. Wolcott regarded Perkins and DeLay, the project manager at Black Rock, as his superiors and dealt directly with them in procuring needed personnel (R. 13, n. 2; 142, 145-146, 224, 225, 272).

for the job. He advised Tuttle to see Wolcott (R. 14; 75-76, 110-111, 113, 155-156). Prior to that day, Sharp had recommended Tuttle to Atkins for his job and Atkins had told Sharp to have Tuttle contact him (R. 14-15, 17; 186, 208, 211, 213-214). Atkins also had specifically requested his immediate superior, Office Manager Weatherman, to secure Tuttle for the job (R. 15, 17, 19; 190-192, 151, 163, 209-214). This was the usual hiring procedure in obtaining warehouse personnel (R. 15; 191-192, 199-201, 208-210). Atkins' status as a supervisor with authority to effectively recommend hiring and discharge was stipulated (R. 19; 134).

Shortly after the interview with Atkins, Tuttle saw Labor Coordinator Wolcott and advised him that Perkins had assigned him to the Black Rock job (R. 15; 76-77, 113-114). Wolcott replied that Perkins had no authority over Black Rock personnel (*ibid.*). He further told Tuttle that there was no vacancy then and that he would be contacted when an opening occurred (R. 16; 227-228, 229). During the interview Tuttle informed Wolcott that he was having trouble getting union clearance (R. 16; 227-228, 234).

Sometime after the Wolcott-Tuttle interview Jack DeLay, project manager at Black Rock, asked Wolcott to "get him a good warehouseman" (R. 16, 20; 274-275). Wolcott thereupon got in touch with Union Agent Fudge, and one Myers was then hired directly through the Union, without the recommendation of Atkins or any other company official, to fill the vacancy caused by Sharp's transfer (R. 16, 20; 212-214,

238-239, 253-255). Petitioner's records show that Myers was hired on February 28, several days after Tuttle had placed his application on file with Wolcott, and 3 days after he had been to Black Rock seeking the warehouse job (R. 16, 20; 262, 273-274). Myers went to work at Black Rock during the first week of March (R. 16; 261-262, 160-161).

Upon learning who had been hired to fill the vacancy at Black Rock, Tuttle went to Fudge's home to protest the Union's clearance of Myers rather than himself (R. 16; 77-79, 116-118).⁶ Fudge angrily rebuked Tuttle for attempting to interfere with Fudge's business and told him not to come to Fudge's house again (R. 16-17; 79, 119). Later another employee, Maples, attempted to ascertain from Fudge why Tuttle was not cleared for employment at Black Rock and Fudge replied, sarcastically, that he could not have such a young man (Tuttle was 70 years old) telling him how to run his business (R. 21; 152-153, 95). Despite his failure to obtain union clearance, Tuttle continued his efforts to obtain work at Black Rock (R. 17; 121-123, 83-84). He repeatedly saw Wolcott but received no encouragement for future employment (R. 17; 123-125, 229-230, 84).

⁶ Tuttle had been told by friends who worked at the warehouse that the new man who was working in Sharp's place had not been a member of the Union before coming to Black Rock (R. 117). Tuttle protested to Fudge that the new man "was a bartender before he come here": "that he took out a permit or joined here, that he didn't carry no former warehouseman's card" and that he should not have been referred in preference to Tuttle (R. 16; 78-79).

On March 6 or 7, Tuttle again saw Atkins at the Black Rock project and the latter advised him that there still was no vacancy (R. 17; 81-82, 189). Atkins informed Tuttle that he had put in a "requisition" initially for Tuttle by name before the hiring of Myers, and indicated that Tuttle had not gotten the Black Rock job because of Fudge's refusal to clear him (R. 17; 82-83, 119, 131-133, 149, 151, 161-162, 208-214, 288). He told Tuttle, "I called you by name and Al Fudge said that you wasn't available for any job on this, on any of these jobs up here" (R. 82). He also advised Tuttle "to go down and talk to [Fudge] real nice and see if you can't get him to clear you" (R. 17; 288-289).

After about 2 weeks' employment at Black Rock, Myers, Sharp's replacement, left and another employee, Ryan, who had previously worked under Atkins, was hired to take his place (R. 18; 150-151, 192-194). Atkins was instrumental in hiring Ryan (R. 18, 20; 192-194). He personally called the Los Angeles office, where Ryan was then employed, to ascertain whether he would be available to work at Black Rock (R. 18; 193, 210). On being told of Ryan's availability, he informed Office Manager Weatherman that he would like to have Ryan as a warehouse clerk (R. 18; 193-194). The Union cleared him (R. 18; 211-239, 254-255, 246).

Early in April, Wolcott, on learning that Maples, another warehouse clerk at Black Rock, planned to resign, telephoned Tuttle and told him of the vacancy. He informed Tuttle that he had him "in mind" to

fill it, and that he would be contacted later with respect to the job (R. 18-19; 84-85, 230-231). Before making Tuttle this tentative offer, Wolcott discussed the matter with Fudge, who told him, in effect, "that is fine with me" or that the decision was up to Wolcott (R. 19; 260-261, 279-280). The tentative offer of a job never materialized, however, because of the discontinuance of the night shifts, and Tuttle was never actually employed at Black Rock (R. 19; 196, 197, 279, 154, 212).

II. The Board's conclusions and order

Upon the foregoing facts, the Board concluded that petitioners violated 8(a) (3) and (1) of the Act by refusing to hire Tuttle because of his failure to obtain clearance from Local 431 of the Teamsters.

The Board ordered petitioners to cease and desist from the unfair labor practices found and from in any other manner, interfering with, restraining or coercing employees or applicants for employment in the exercise of their rights guaranteed under Section 7 of the Act (R. 44-45). Affirmatively, the Board ordered petitioners to offer employment to Tuttle and make him whole for any loss of earnings (less any sum of money already paid)⁷ because of petitioners' discrimination, and to post appropriate notices (R. 45-46).

⁷ A settlement of a charge filed by Tuttle against Local 431, calling for the payment of a sum of money to Tuttle by Local 431, had been effectuated prior to the hearing (R. 23, n. 4; 127-131).

ARGUMENT

I. Substantial evidence supports the Board's findings that petitioners, in violation of Section 8(a) (3) and (1) of the Act, refused to hire Tuttle because he was unable to obtain union clearance

It is undisputed that when Tuttle informed Local 431's business agent, Fudge, that he had been told by Perkins to report to work at the warehouse clerk's job at Black Rock, and asked Fudge to transfer his local card and clear him for the job, Fudge became very angry and refused to grant the transfer and clearance, telling Tuttle that Local 431 already had more warehousemen than were needed. It is not clear whether Fudge's objection to transferring Tuttle's card and clearing him for the job resulted from his resentment over Tuttle's attempt to obtain the job without first reporting to the Union, from a policy against permitting men from other locals to obtain jobs for which unemployed members of Local 431 were eligible, or from a combination of these reasons. The Union, of course, could not lawfully have caused petitioners to deny employment to Tuttle for any of those reasons.⁸ In these circumstances, regardless of whether petitioners were aware of the reasons motivating Fudge in refusing to clear Tuttle, petitioners could not lawfully refuse to hire Tuttle because of his lack of union clearance. Indeed, petitioners do not dispute that if, as the Board found, their refusal to

⁸ See, e.g., *N.L.R.B. v. International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581, 583 (C.A. 9); *N.L.R.B. v. Local 542, International Union of Operating Engineers*, 255 F. 2d 703, 704-705 (C.A. 3); *N.L.R.B. v. Pacific Inter-mountain Express Co.*, 228 F. 2d 170, 173-174 (C.A. 8).

hire Tuttle was because of his lack of union clearance, their conduct was in contravention of Section 8(a) (3) and (1) of the statute. Discrimination of this nature unquestionably restrains and coerces employees in the exercise of their right to perform or refrain from performing union obligations or supposed obligations and inherently encourages union membership in the broad sense. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40-42, 45, 54; *N.L.R.B. v. Local 743, Carpenters (General Electric Co.)*, 202 F. 2d 516, 518 (C.A. 9); *N.L.R.B. v. Shuck Construction Co.*, 243 F. 2d 519, 520-521 (C.A. 9); *N.L.R.B. v. Thomas Rigging Co.*, 211 F. 2d 153, 156-157 (C.A. 9), certiorari denied, 348 U.S. 871.

Accordingly, the sole issue is whether substantial evidence supports the Board's finding that petitioners refused employment to Tuttle because he was unable to obtain union clearance.

The evidence summarized in the Counterstatement, *supra*, amply supports the Board's finding that petitioners refused to hire Tuttle for that reason. It shows that Atkins' the warehouse manager at Black Rock, who admittedly had authority effectively to recommend the hire and discharge of employees, specifically asked his immediate superior, Office Manager Weatherman, to obtain Tuttle for the warehouse clerk's job. In making the request, Atkins was following the usual procedure for obtaining warehouse personnel. This request was made prior to the time when Tuttle on February 25 interviewed the Union's business agent and incurred his displeasure.

Nevertheless, when Tuttle later in the day on February 25 spoke to Atkins about the job which his friend Sharp was leaving, Atkins told him that it was already filled. He was similarly advised by Labor Coordinator Wolcott, whom he next interviewed. The job, however, had not in fact been filled. Wolcott conceded that it was *subsequent* to his interview with Tuttle that the Black Rock projects manager asked Wolcott to get him a good warehouse clerk.⁹ Wolcott—instead of hiring Tuttle, whom Atkins had recommended, but who, Wolcott knew, had incurred the union business agent's displeasure—requested the Union's agent to send him a warehouse clerk and the latter sent him Myers, whom petitioners had not specifically requested and who had not even applied for the job (R. 275). Myers was hired on February 28—three days after both Atkins and Wolcott had told Tuttle that the job was already filled—and he did not report for work until the first week in March when Sharp left for the Wishon Dam project. Furthermore, Myers worked for only about two weeks and petitioners again passed over Tuttle, who they knew was still available for employment, and obtained, instead, an employee from Los Angeles, whom the Union cleared. In these circumstances, the Board reasonably found that Atkins and Wolcott falsely told Tuttle on February 25 that a replacement for Sharp had al-

⁹ Since, as Wolcott testified and the Board found (R. 16; 274-275), Wolcott did not request Fudge to obtain a replacement for Sharp until several days after the Tuttle-Wolcott interview, there is obviously no merit to petitioners' suggestion (Br. p. 23) that Myers had been promised the job prior to February 25.

ready been hired because they had learned of Fudge's unwillingness to clear Tuttle.

Petitioners' treatment of Tuttle was, moreover, consistent with their practice of requiring that applicants for employment be cleared through the Union (R. 21; 70-71, 110, 176-178, 200-204, 211, 237-239, 246-248, 254-255, 260, 217). Indeed, Project Manager Perkins at the Wishon project advised Tuttle to clear through the Union because that was the "normal procedure" (R. 21; 177-178). And Warehouse Manager Atkins at Black Rock, in obvious recognition of this practice, advised Tuttle to talk to Fudge "real nice" and see if Tuttle could not persuade Fudge to clear him (R. 17; 288-289). Furthermore, as we have seen, Atkins indicated to Tuttle that it was Fudge's refusal to clear him which had resulted in Tuttle's failure to obtain employment at Black Rock.

The Board properly discounted petitioners' attempt to minimize the significance of Atkins' request that Tuttle be hired for the warehouse clerk's job. As the Board pointed out, it was stipulated at the hearing that Atkins was a supervisor with authority effectively to recommend in matters of hiring and discharging, and although Atkins testified that his recommendations with respect to hiring were followed only about half the time, the record shows only one instance when his recommendation was overruled—an occasion when the son of his immediate superior was hired (R. 19-20; 218-220). Admittedly warehouse clerks Maples and Ryan were hired on his recommendation (R. 20; 147, 199-200, 192-194). Myers, however, was

hired instead of Tuttle “not on the strength of anybody’s recommendation but through clearance with Fudge” (R. 20).

In their brief to this Court, petitioners take sharp issue with the Trial Examiner’s credibility findings, adopted by the Board. Indeed, petitioners argue that the Board should not have credited two of their own witnesses, Warehouse Manager Atkins and Labor Coordinator Wolcott, on several significant points.

For example, despite Atkins repeated and unwavering affirmation that it was *prior* to February 25 that he had specifically requested Office Manager Weatherman to obtain Tuttle as Sharp’s replacement (R. 186, 190–191, 208–209, 211) and petitioners’ failure to call Weatherman to refute this testimony, petitioners now urge that Atkins’ recollection must be faulty (Br. p. 24). Petitioners forget that credibility issues are for the Trial Examiner and Board to determine and should rarely be disturbed by the Courts. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494–496. In any event, the exact time when Atkins first learned of Tuttle’s availability assumes significance only in its relationship to the sequence of events. The record, as already shown, amply supports the Board’s finding that Atkins learned of Tuttle’s availability and specifically requested that Tuttle be hired some time before Fudge prevented Tuttle from obtaining the job by refusing to clear him. Petitioners’ suggestion (Br. p. 21) that because of the Black Rock project’s remoteness from Fudge’s headquarters, Atkins could not have learned of Fudge’s objection to Tuttle be-

fore Atkins told Sharp on February 25 that the latter's replacement had already been hired, ignores the fact that the telephone, a logical means of communication, was available at the project (R. 75-76, 132, 163, 230).

Petitioner also contended that the Board improperly credited Labor Coordinator Wolcott's testimony to the effect that it was several days *after* his first interview with Tuttle that he received a request to obtain a replacement for Sharp and called upon Fudge to furnish such replacement (Br. p. 23). Wolcott, however, was very positive on this point (R. 274-275) and his testimony ties in with petitioners' records which show that Sharp's replacement, Myers, had not, as petitioner contends, already been hired by February 25 but that he was, instead, hired on February 28 and reported for work during the first week in March when Sharp left. Wolcott's testimony is, moreover, consistent with Atkins' explanation to Tuttle that Fudge had refused to clear him and Atkins' advice to Tuttle "to go down and talk to [Fudge] real nice and see if you can't get him to clear you" (R. 17; 288-289). Thus, aside from the fact that the Trial Examiner, who saw and heard the witnesses and lived with the case, is in the best position to resolve credibility issues, his acceptance of Wolcott's testimony was warranted as a logical explanation of what happened in the light of other evidence showing that union clearance was customarily required by petitioner as a condition of employment.

II. The Board's order is valid and proper

Petitioners assert that paragraph 1(b) of the Board's order is too broad in scope. It requires petitioners to cease and desist from "in any other manner" violating Section 8(a)(1) of the statute. In view of the nature of petitioners' offense—a discriminatory refusal to hire, in violation of Section 8(a) (3) and (1) of the Act—we submit that the Board's order was not an abuse of its discretion.

Insofar as the Board found that petitioners' conduct was violative of Section 8(a)(1) of the Act, the Board properly directed petitioners to cease and desist from interfering with, restraining or coercing employees, or applicants for employment, in the exercise of their Section 7 rights. The discriminatory refusal on the part of petitioners to hire Tuttle goes to the very heart of the Act and justifies the Board's determination that a repetition by petitioners of a violation of that section in the future may be anticipated by reason of their unlawful conduct (R. 44, n. 1). *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4). The serious nature of the unfair labor practices which the Board found petitioners committed fully warrants the Board's determination that a broad cease and desist order is necessary "to prevent the [petitioners] * * * from engaging in any unfair labor practice affecting commerce." *May Dept. Stores v. N.L.R.B.*, 326 U.S. 376, 390. It constitutes a reasonable exercise of the Board's authority "to prevent violations, the threat of which in the future is indicated because of their similarity or re-

lation to those unlawful acts which the Board has found have been committed by the employer in the past." *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 436-437. In view of the record showing *supra*, p. 13, that union clearance was a customary procedure, there are reasonable grounds to anticipate that petitioners will infringe upon other rights guaranteed employees in the future unless appropriately restrained. The petitioners struck not only at the particular right involved but all the interdependent and related guarantees which support and surround the particular right involved (see *N.L.R.B. v. Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 944 (C.A. 3)).

Finally, petitioners request this Court to modify the Board's order by striking the provision which requires petitioners to offer Tuttle immediate employment and further, to limit the back-pay period to on or about April 12, 1957, the date on which petitioners abolished its night shift. There is no merit to this request. Sharp, for whom Tuttle would have been hired as a replacement but for the Union's refusal to clear him, was working on the day shift (R. 75, 136, 137, 149). When he left, Maples, who had been working on the swing shift, stepped into the day shift job and Myers took the swing shift job (R. 149, 158). Both Maples and Myers, however, had left petitioners' employ by the time the night shifts were eliminated (R. 150, 196) and there is no reason to assume that Tuttle would not have been working on the day shift at that time if he had been hired. In any event, questions such as that now raised by peti-

tioners are appropriately handled in subsequent administrative proceedings before the Board and petitioners will have a further opportunity to demonstrate the period, if any, during which curtailment of its operations would affect or eliminate back-pay liability to Tuttle in the subsequent compliance proceedings. *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 598 (C.A. 5); *N.L.R.B. v. Reliance Clay Products Co.*, 245 F. 2d 599, 600 (C.A. 5); *N.L.R.B. v. Cambria Clay Prod. Co.*, 215 F. 2d 48, 56 (C.A. 6) (and cases cited therein). General orders of this sort entered by the Board with respect to back pay and offers of immediate employment manifestly contemplate further administrative action on its part, i.e., determination of the exact amount of back pay to be tendered and determination as to what positions are available and substantially equivalent for the purposes of the remedy ordered. *Home Beneficial Life Ins. Co. v. N.L.R.B.*, 172 F. 2d 62, 63 (C.A. 4) certiorari denied, 332 U.S. 756. If in fact there is no position available for Tuttle, the Board, under its reservation of jurisdiction, can conform its ultimate "immediate employment" and back-pay order to meet that situation. *N.L.R.B. v. Brown & Root, Inc.*, 203 F. 2d 139, 147 (C.A. 8); cf. *Wallace Corporation v. N.L.R.B.*, 159 F. 2d 952, 954 (C.A. 4) affirmed 332 U.S. 248; *N.L.R.B. v. Bird Machine Co.*, 174 F. 2d 404, 405-406 (C.A. 1).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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JUNE 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided

in section 2112 of title 28, United States Code, Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the

Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

United States Court of Appeals
For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
CORPORATION and B. PERINI & SONS, d/b/a Kings
River Constructors, a joint venture,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

— and —

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO
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PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW
DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS
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BOARD TO ENFORCE SAID ORDER AGAINST THE
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**REPLY BRIEF OF KINGS RIVER CONSTRUCTORS,
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ALLEN, DEGARMO & LEEDY

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United States Court of Appeals For the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J.
KAISER, MACCO CORPORATION and B.
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structors, a joint venture, *Petitioners*,

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structors, a joint venture, *Respondents*.

No. 16301

PETITION BY KINGS RIVER CONSTRUCTORS TO REVIEW
DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS
BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS
BOARD TO ENFORCE SAID ORDER AGAINST THE
KINGS RIVER CONSTRUCTORS

REPLY BRIEF OF KINGS RIVER CONSTRUCTORS, PETITIONERS

I.

SCOPE OF REVIEW

The Brief of the National Labor Relations Board
filed in this cause purports to support the Order of the
Board appealed from on the sole basis that the only

issue involved is credibility of the witnesses, which it contends places the resolution of the case exclusively within its own determination. By its contention that all that is involved in considering whether the record in this case supports the Order is determining credibility, the Board seeks to place a blanket of immunity from judicial review on any case in which there is any portion of the testimony which, by ignoring the remainder, could arguably support the result, notwithstanding a direct conflict between such testimony and other testimony which must from its very nature be accepted.

These petitioners are just as familiar with the doctrine limiting judicial review of findings where the issue involved is *mere credibility* as the Board. We further recognize that to defeat judicial review, it is the standard defense to contend that only issues of *mere credibility* are involved, and to parrot the always quoted phrase (appearing on page 15 of the Board's Brief), "that the Trial Examiner, who saw and heard the witnesses and lived with the case, is in the best position to resolve credibility issues,".

However, the real issue in this case is whether Board findings can be sustained which are irreconcilably in conflict with facts established by the record beyond question. These facts have simply been ignored in the decision of the Trial Examiner, the Board, and now the Brief on behalf of the Board to this court. In their place, certain conclusions as to what must have happened have been substituted, which conclusions are not only based on pure speculation, but which are incon-

sistent with that which the evidence establishes did happen.

This case presents the classic situation to which the change in the scope of judicial review contained in the Taft-Hartley Act and fully discussed in the landmark case of *Universal Camera Corporation v. National Labor Relations Board* (1950) 340 U.S. 474, 95 L.Ed. 456, is applicable.

The Board argues in its brief that because some portions of the record may be referred to as supporting the Board findings, they have met the test of substantiality, notwithstanding that these portions of the record give support only "when viewed in isolation." *Universal Camera Corp.* case, *supra*, page 478 of U. S.

This was exactly the scope of review rule, involving judicial abdication as applied by some courts, which brought about the remedial action of Congress in enacting the review provisions of the Administrative Procedure Act, 5 U.S.C. 1009 (e) and the Taft-Hartley Act. This history is thoroughly discussed in pages 477 to 487 of 340 U.S., *Universal Camera Corporation v. N.R.L.B.*, which case, considering the frequency of its citation, is undoubtedly of almost memorized familiarity to the above court.

We urge it again only because the Board feels content to support its decision merely by calling upon the protective cloak of "credibility," and ignoring the actual conflict and inconsistency between the established facts and the Board decision. If the Trial Examiner and the Board can refuse to credit that which

must be credited, that which occurred beyond all doubt, and that which cannot be otherwise rationalized with the theory of decision, then there is no meaning to the phrase "on the record considered as a whole" or in the *Universal Camera* case.

There is of course meaning to the statutory standard and the meaning is that in establishing facts, there is considerable discretion vested in the Board, in selecting between conflicting testimony of at least equal weight and probability, but the Board does not have discretion to find against the substantial weight of evidence, even though there be some evidence pointing in the other direction, nor does the Board have discretion to simply ignore that which cannot be otherwise explained.

II.

EXCEPTIONS TO COUNTERSTATEMENT OF FACT BY THE BOARD

Although the Board has not set forth on what basis the statement of fact by petitioner is in error, it has nevertheless made a counterstatement of fact which is entirely in conflict on material findings, to-wit: (Page references are to Board Brief)

1. The Board continues to insist on page 6 that:

"Prior to that day, Sharp had recommended Tuttle to Atkins for his job and Atkins had told Sharp to have Tuttle contact him (R. 14-15, 17; 186, 208, 211, 213-214). Atkins also had specifically requested his immediate superior, Officer Manager Weatherman, to secure Tuttle for the job (R. 15, 17, 19; 190-192, 151, 163, 209-214)."

This statement is made without in any manner at-

tempting to rationalize Mr. Sharp's testimony that the Monday of Mr. Tuttle's arrival on the job-site was also the first date that Sharp told Atkins of Tuttle's availability, as set forth in page 145 of the transcript and pages 16 through 18 of petitioner's brief, and it was only through Sharp that Atkins learned of Tuttle's availability (Tr. 186).

2. On page 6, the Board contends "during the interview Tuttle informed Wolcott that he was having trouble getting union clearance (R. 16; 227-228, 234)." The interview referred to occurred on Monday, the 25th, yet the reference to the record refers to a second interview on Tuesday, the 26th. It was at the second interview one day later that Tuttle first advised Wolcott of having difficulty with the union business agent.

3. On page 6:

"Sometime after the Wolcott-Tuttle interview Jack DeLay, project manager at Black Rock, asked Wolcott to 'get him a good warehouseman' (R. 16, 20; 274-275)."

Neither the testimony on the pages referred to nor any other testimony establishes that the request by the project manager was made after the Wolcott-Tuttle interview. What does appear from those pages is that Myers was actually hired on February 28, three days after Tuttle first approached Wolcott. These distinctions are important, as will be hereinafter discussed.

4. On page 8:

"Atkins informed Tuttle that he had put in a 'requisition' initially for Tuttle by name before the hiring of Myers, and indicated that Tuttle had

not gotten the Black Rock job, because of Fudge's refusal to clear him (R. 17; 82-83, 119, 131-133, 149, 151, 161-162, 208-214, 288). He told Tuttle, 'I called you by name and Al Fudge said that you wasn't available for any job on this, on any of these jobs up here' (R. 82). He also advised Tuttle 'to go down and talk to (Fudge) real nice and see if you can't get him to clear you' (R. 17; 288-289)."

There is testimony that Atkins at some time attempted to hire Tuttle, but the testimony does not establish that it occurred prior to the hiring of Myers.

Transcript 82 and 83 involve a conversation which occurred around March 6 or 7 (Tr. 81), and which was the time of hiring of Ryan and not Myers.

Transcript 119 confirms that Mr. Atkins talked to Mr. Tuttle about Fudge at a later date.

Transcript 131-133 is Tuttle's version of the conference on March 6 or later.

Transcript 149 is Maples' version of the Tuttle-Atkins conference concerning Fudge, although Maples places the date on about March 15.

Transcript 151 again places the date of the Atkins-Tuttle discussion around March 15, which was the time of hiring Ryan.

Transcript 162 is a conclusion of Maples' and not testimony of what was said.

Transcript 208-14 contains Mr. Atkins' testimony on page 209 that he requested Mr. Tuttle around the 19th or 20th of February, although he in fact did not learn of his availability until the 25th. Atkins' testimony is adopted over the testimony of Sharp and Tuttle on this

issue only because it fits into the Board's theory and is necessary to sustain its decision.

Transcript 288 is again Tuttle's version of a conversation which occurred on or about March 15.

III.

REPLY TO BOARD ARGUMENT

1. On page 10, the Board recognizes that it is not clear which of several reasons as speculated upon in the argument was the cause of difficulty between Fudge and Tuttle. The petitioners can as easily speculate on reasons which would be entirely lawful, including the fact that Fudge had already committed the job to Myers. The Board has the burden of proof in these matters, and under familiar rule, their failure to call Fudge can only be interpreted as indicating that his testimony would have been adverse to the Board's contention. He had already settled his case with the Board, and presumably would have been a witness without motive or interest.

2. On page 10, the Board states that Petitioners do not dispute that if their *refusal* to hire Tuttle was because of his lack of union clearance, their conduct violated the Act. We do not dispute that refusal to hire a person because of lack of union clearance violates the Act, but we vigorously dispute that the Petitioners in fact refused to hire Tuttle at any time. They failed to hire him at a time when he apparently became involved in a dispute with the union business agent, and the Board is attempting to connect this dispute with the failure to hire.

3. On page 11, the Board continues to contend and argue that the request was made for Tuttle "prior to the time when Tuttle on February 25 interviewed the union's business agent and incurred his displeasure." Again this argument is made notwithstanding conclusive testimony that Atkins did not even know Tuttle was available or existed until Sharp arrived on the job on Monday, and told Atkins about Tuttle, at which time Atkins immediately advised that the job was committed.

a. In attempting to dispose of this conflict, on page 14 the Board's Brief states: "In any event, the exact time when Atkins first learned of Tuttle's availability assumes significance only in its relationship to the sequence of events" . . . Petitioners are at a loss to understand what is meant by this phrase in view of the fact that the "sequence of events" is the crux of the case. Knowledge of Tuttle's availability and a request for his hire prior to Monday, February 25 forms the entire basis of the Trial Examiner's decision, including his conclusions that Wolcott and Atkins were lying.

b. The Board attempts to avoid the impact of this irreconcilable conflict by suggesting that "the telephone, a logical means of communication, was available at the project (R. 75-76, 132, 163, 230)." There is of course no evidence whatsoever of any telephone calls between any parties during this week-end concerning Tuttle. The situation in this case is identical to that contained in a case of *N.L.R.B. v. Amalgamated Meat Cutters*, CA 9, 1953 (202 F.2d 671), from which the following is quoted at page 673:

"Notwithstanding this want of anything but hearsay to support this particular portion of the

complaint against the Union, the trial examiner arrived at his conclusion by saying: 'However, the circumstances set forth in the evidence establish in the case of E. A. Wyatt, Gearhart *must have been told* by the Union that the Union objected to the continuation of Wyatt's employment.' (Emphasis added.) The Board is not permitted to arrive at conclusions based on such speculations."

We might paraphrase the Board by saying that somebody "must have telephoned," yet there is no basis for even inferring that such a call was made. Tuttle would not have called Atkins because he did not know him. Sharp did not call him because he testified that he did not mention Tuttle to Atkins until he arrived on the job on Monday morning, February 25 (Tr. 145). Wolcott would not have called because he did not know Tuttle. Perkins did not testify of any call. He merely took Tuttle to the Kings River office in Fresno. Fudge did not call because he did not meet Tuttle until Monday, the 25th.

4. On page 12:

"Wolcott conceded that it was *subsequent to* his interview with Tuttle that the Black Rock project manager asked Wolcott to get him a good warehouse clerk." (Tr. 274-275).

In this testimony, under interrogation by the Trial Examiner, Wolcott states that the arrangements to hire Myers were made after the initial Tuttle interview. But it is apparent that the arrangements referred to were arrangements of the actual hiring, which occurred on February 28. The original arrangements of calling the union to supply a person were obviously made in advance of this time. Mr. Sharp testified that Perkins advised Atkins that Sharp would be transferred out,

and this advice occurred on Friday, February 22. The conclusion that the request by Mr. DeLay to obtain a good warehouseman occurred subsequent to Monday, February 25, leaves without explanation the established fact that the job was committed on Monday morning when Atkins first learned of Tuttle from Sharp.

5. Pages 13 and 14 purport to establish the probability of Tuttle's hire by referring to Atkins' request. It appears from the record that Atkins made such a request while waiting for word on the availability of Mr. Ryan in the middle of March, as suggested by Mr. Atkins' testimony as follows (Tr. 193):

"A. I believe in the case of Mr. Ryan I contacted the district office, Mr. Marv Muller.

Q. You contacted them direct?

A. That is right. And I asked if Mr. Ryan was available, that I would like to procure him. And at that time I was informed that he was not available.

Q. I see. And then what was your procedure?

A. Then I put a request in for a man and about four hours later I received a call from Los Angeles, from Mr. Muller, that Mr. Ryan would be available. And I asked to have him come in."

This is the only occasion under the evidence when such a request would have been made. There were only three jobs, the one filled on February 25 when Tuttle first arrived, the one Ryan filled which Tuttle might have otherwise gotten, had Ryan not been available, and the one actually offered to Tuttle in April.

It appears that whatever difficulty Tuttle had with

Fudge was later a subject of general conversation, and Fudge's conduct in attempting to interfere with Tuttle's obtaining employment certainly amounts to an unfair labor practice, for which we are advised Local 431 has complied by a settled charge. If there was evidence of a refusal by petitioners to hire Tuttle because of failure to get a clearance, petitioners might also have committed an unfair labor practice. However, the evidence is only of a failure to hire Tuttle under circumstances which are consistent with the unavailability of a job and are inconsistent with discriminatory refusal to hire.

In CONCLUSION, we are not asking this court to accept one of two equally possible versions of the evidence in this case. We are asking it to determine that the version of events adopted by the Board cannot be sustained when the entire record is considered.

Respectfully submitted,

ALLEN, DEGARMO & LEEDY

By GERALD DEGARMO

SETH W. MORRISON

July 1, 1959

1308 Northern Life Tower
Seattle 1, Washington

No. 16304 ✓

United States
Court of Appeals
for the Ninth Circuit

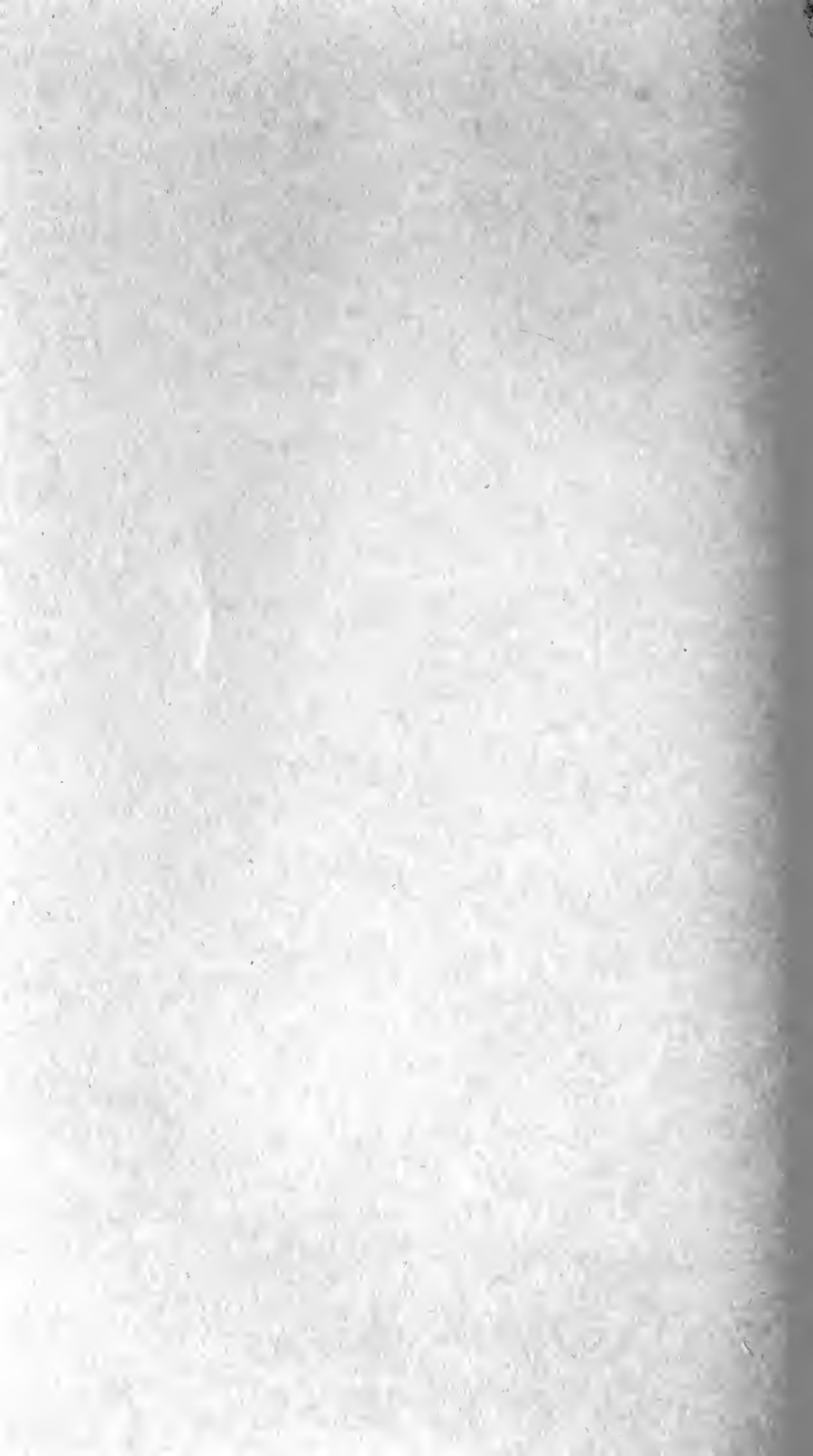
ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILE
APR 12 1959
PAUL P. O'BRIEN



United States
Court of Appeals
for the Ninth Circuit

VS.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Assistant Attorney General,

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Attorney,

Department of Justice,
Washington 25, D. C.,

Attorneys for Respondent.

Tax Court of the United States

Docket No. 57535

**ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
EXECUTORS,** Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1955

Apr. 26—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 27—Copy of petition served on General Counsel.

Apr. 26—Request For Circuit hearing in San Francisco, Calif. filed by taxpayer. 4/28/55, granted.

Jun. 7—Answer filed by G.C.

Jun. 10—Copy of answer served on taxpayer, San Francisco.

1957

Apr. 10—Hearing set June 17, 1957, San Francisco.

Jun. 17, 20, 21—Hearing had before Judge Van Fossan on the merits. Submitted after trial. Appearance of Grant G. Calhoun, Esq. filed. Stipulated of Facts filed. Petitioner's brief due Aug. 6, 1957; answering brief due Sept. 20, 1957; reply brief due Oct. 21, 1957.

1957

- Jul. 9—Transcript of hearing June 17, 1957 filed.
Jul. 9—Transcript of hearing June 20, 1957 filed.
Jul. 9—Transcript of hearing June 21, 1957 filed.
Jul. 29—Motion for extension of time to Aug. 25, 1957 to file Brief filed by Petitioner. 7/29/57, Granted to Aug. 20, 1957. Served Jul. 31, 1957.
Sep. 3—Brief for Petr. filed. Served 9/11/57.
Oct. 18—Desp. brief in answer filed. Served 10/22/57.
Nov. 18—Motion by petr. for extension of time to Dec. 17, 1957 to file reply brief. Granted 11/18/57. Served 11/21/57.
Dec. 16—Petr.'s Brief in Reply filed. Served 12/19/57.

1958

- Apr. 28—Findings of Fact and Opinion filed, Judge Van Fossan, Dec. will be entered under R. 50. Served 4/28/58.
Jun. 24—Resp. Computation filed.
Jun. 30—Notice of Hearing on R. 50 Comp. Aug. 6, 1958, Wash., D. C.
Jul. 31—Petr.'s objection to Comp. of Respondent under Rule 50 filed.
Aug. 6—Hearing on Rule 50. Judge Van Fossan. Order will be entered in accordance with Resp. Computation.
Aug. 8—Decision entered, Judge Van Fossan.
Aug. 14—Transcript of Proceedings 8/6/58 filed.
Sep. 15—Petition for review by U.S.C.A. 9th filed by petr.

1958

Oct. 17—Proof of service of petition for review filed.

Dec. 17—Designation of Contents of record on review, with proof of service thereon filed.

Dec. 17—Designation of additional portions of record with proof of service thereon filed.

[Title of Tax Court and Cause.]

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency A:R:90—D:HMB dated February 14, 1955, and as a basis of their proceeding allege as follows:

1. The petitioner are the duly appointed, qualified and acting Executors of the Last Will and Testament of J. Leslie Vogel, deceased, with principal offices at 1710 Shell Building, San Francisco 4, California. The state tax return here involved for the Estate of J. Leslie Vogel, deceased, who died August 16, 1950, was filed with the Collector for the 1st District of California, 100 McAllister Street, San Francisco, California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioners on the 14th day of February, 1955.

3. The deficiencies as determined by the Com-

missioner are in estate taxes in the amount of \$29,601.88, of which approximately \$29,601.88 is in dispute.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The determination by the Commissioner that the assets of decedent standing in his name were not his separate property but were, together with the assets standing in the name of Elizabeth S. Vogel, his widow, all community property;

(b) The determination by the Commissioner that the sum of \$1500.00 per month for the support of the widow for a period of 18 months during administration of the estate was excessive and that no more than \$1000.00 per month for said period of time was an allowable deduction; and

(c) The determination by the Commissioner that the cost of maintenance and upkeep of a boat owned by the estate was not an allowable deduction.

5. The facts upon which petitioners rely as the basis for this proceeding are as follows:

(a) On January 15, 1934, Les Vogel Chevrolet Company was organized to operate an automobile agency and the stock of said corporation was community property of the decedent and Elizabeth S. Vogel, his wife. On April 18, 1936, the stock was transferred to the decedent and his said wife as joint tenants. At a corporate meeting on Decem-

ber 23, 1942, it was determined to liquidate the corporation as of midnight, December 31, 1942. Forthwith following the liquidation, the assets of said corporation were transferred to a partnership consisting of decedent, his said wife, and J. Leslie Vogel, Jr., decedent's son, as equal partners. Said partnership operated the automobile agency until October 31, 1946, when a new corporation, Les Vogel Chevrolet Company, was formed. The partnership assets were transferred to it and one-third of the stock of said corporation was issued to decedent, one-third to his said wife, and one-third to his said son. Said stock was the major item of the estate. Decedent's one-third interest in the automobile agency represented by the one-third of the issued and outstanding shares of said stock of said corporation in the name of decedent at the time of his demise had been converted to and was at the time of the demise of decedent his separate property, and the one-third interest in said automobile agency represented by the one-third of the issued and outstanding shares of stock of said corporation in the name of Elizabeth S. Vogel, decedent's said wife, had been converted to and was at the time of decedent's demise, her separate property, and the assets resulting from profits of said partnership and dividends from the stock of said new corporation were the separate property of decedent and his said wife, respectively.

(b) Said widow of decedent was actually paid by said Executors \$1500.00 per month for her sup-

port for a period of 18 months during the administration of the estate. Said payment was authorized by the laws of the State of California and was made pursuant to the order of the Superior Court of the State of California, in and for the City and County of San Francisco, the court in which said estate was pending, and that said sum is not in excess of what was reasonably required for the support of the widow in view of her class and station in life, the size of the estate, and the income therefrom.

(c) A boat was owned by the decedent and his estate and \$5400.00 was actually expended by said Executors for its maintenance and upkeep.

Wherefore petitioners pray that this Court may hear the proceeding and determine that there is no deficiency due.

Dated: San Francisco, California April 22, 1955.

/s/ TEVIS JACOBS,

Counsel for Petitioners.

Of Counsel:

Samuels, Jacobs & Sills.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department
Internal Revenue Service
100 McAllister Street
San Francisco 2, California
Office of District Director of Internal Revenue

Feb. 14, 1955

In Replying Refer to: Chief, Audit Division A:R:
90-D:HMB.

O:A:UE—First California District
Estate of J. Leslie Vogel
Date of Death: August 16, 1950

Estate of J. Leslie Vogel
Robert G. Partridge and
Mrs. Elizabeth S. Vogel, Co-Executors
1710 Shell Building
San Francisco 4, California

Dear Mr. Partridge and Mrs. Vogel:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of \$29,601.88 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address,

Exhibit "A"—(Continued)

Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, 100 McAllister St., San Francisco 2, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

/s/ By GLEN T. JAMISON,
District Direct of Internal Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

Exhibit "A"—(Continued)

STATEMENT

Chief, Audit Division

A:R:90—D:HMB

Estate of J. Leslie Vogel

Robert G. Partridge and

Mrs. Elizabeth S. Vogel, Co-Executors

1710 Shell Building

San Francisco 4, California

O:A:UE—First California District

Estate of J. Leslie Vogel

Date of Death: August 16, 1950

	Liability	Assessed	Deficiency
Estate tax	\$91,818.05	\$62,216.17	\$29,601.88

This determination of the Federal estate tax liability of the above-named estate has been made upon the basis of information on file in this office.

A copy of this letter and statement has been mailed to your representative. Mr. Tevis Jacobs, 333 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income

Net estate for basic tax as disclosed by the return\$200,404.11

Additions to value of net estate and

decrease in deductions:

(a) Jointly owned property—Schedule E \$ 7,034.16

(b) Other miscellaneous property—

Schedule F 29,110.93

(c) Funeral and administration expenses—

Schedule J-1 11,939.43

(d) Debts of decedent—Schedule K-2 5,687.59

(e) Support of dependents—Schedule L-4 18,000.00

(f) Marital deduction—Schedule M-9 61,077.55 132,849.66

\$333,253.77

Increase in deductions:

(g) Stocks and bonds—Schedule B 18,955.00

Net estate for basic tax as adjusted\$314,298.77

Net estate for additional tax as adjusted\$354,298.77

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) Jointly owned property—Schedule E

	Returned	Determined
Item 3—Savings account—Bank of America, Marina Branch	\$ 0.00	\$ 9,834.48
Item 4—Savings account—Bank of America, Polk-Van Ness Branch	19,177.14	9,588.57
Item 5—Series E—United States War Bonds	6,008.50	3,004.25
Item 7—Series E—United States War Bonds	0.00	9,792.50
	<hr/>	<hr/>
	\$25,185.64	\$32,219.80
Increase	\$ 7,034.16	

Available information discloses that all jointly owned property of the spouses was community property. The above adjustments have therefore been made on a community property basis.

(b) Other miscellaneous property—
Schedule F

	Returned	Determined
Item 1—Kneass Twin Screw Cabin Cruiser	\$10,000.00	\$ 5,000.00
Item 2—Clothing and personal effects	10.00	5.00
Item 3—White metal man's ring with white solitaire stone	650.00	325.00
Olympic Club Class A Golf privilege	0.00	142.50
4 shares—Pacific Turf Club stock	0.00	1,700.00
500 shares—Pacific Gas & Electric Redeem- able first Preferred	0.00	7,156.25
467 shares—Bank of America	0.00	6,333.69
217 shares—Pacific Gas & Electric common	0.00	3,499.13
250 shares—Leslie Financing Company	0.00	5,627.62
Anzavista Apartment property	0.00	8,800.00
Savings account—Marina Branch, Bank of America	0.00	1,181.74
	<hr/>	<hr/>
	\$10,660.00	\$39,770.93
Increase	\$29,110.93	

Exhibit "A"—(Continued)

Explanation of Adjustment—(Continued)

The determined value of the itemized securities in the name of the surviving spouse shown above is based on the mean between the high and the low sales or bid and ask quotations on the New York Stock Exchange or other reliable trade sources.

The value of the Anzavista Apartment property is shown as the investment therein at the date of death of the decedent.

The Leslie Financing Company stock is based on the book value.

(c) Funeral and Administration Expenses—
Schedule J-1

	Returned	Determined
Item 2—Attorneys' fees	\$ 7,000.00	\$ 3,260.61
Item 3—Cypress Lawn Cemetery Association	1,601.35	800.68
Item 4—Halsted & Company	1,342.91	671.45
Item 5—Julius Eppstein	232.88	116.44
Item 6—Miscellaneous administration and legal expenses	175.00	87.50
Item 7—Appraisals	1,105.35	552.68
Item 8—A. H. Goebel, Certified Public Accountant	150.00	75.00
Item 9—Fireman's Fund Insurance Company	725.00	228.00
Item 10—Maintenance and upkeep on boat	5,400.00	0.00
	<hr/>	<hr/>
	\$17,732.49	\$ 5,793.06
Decrease		\$11,939.43

Item 2 and Item 9 have been adjusted to the correct amount received in accordance with affidavit on file in this office.

Item 10 has been disallowed since it is held that this item does not represent an administration expense.

Since the entire estate has been determined to be community property the deductions shown above are shown as community one-half interest.

Exhibit "A"—(Continued)

Explanation of Adjustment—(Continued)

(d) Debts of Decedent—Schedule K-2

	Returned	Determined
Item 1—American Ambulance		
Company	\$ 9.50	\$ 4.75
Item 2—Nursing care—last illness	65.30	32.65
Item 3—Medicines—last illness	24.33	12.16
Item 4—Roberto Escamillo, M.D.	50.00	25.00
Item 5—Franklin Hospital—		
last illness	43.75	21.88
Item 6—San Francisco Elevator		
Company	3,140.00	1,570.00
Item 7—Federal income taxes due at		
date of death	7,735.52	3,714.37
	<hr/>	<hr/>
	\$11,068.40	\$ 5,308.81
Decrease		\$ 5,687.59

Item 1 to Item 6, inclusive, have been adjusted on a community property basis.

Item 7—Since a joint Federal income tax return was filed by the surviving spouse for the calendar year 1950, allocation of the tax due has been made to the date of death, as follows:

	Total	Income to Date of Death of Decedent	Surviving Spouse
Salary	\$13,500.00	\$ 6,750.00	\$ 6,750.00
Dividends	33,876.60	16,600.00	17,276.60
	<hr/>	<hr/>	<hr/>
	\$47,376.60	\$23,350.00	\$24,026.60
Total tax reported for year			\$14,478.52
Tax allocated to decedent—			
23350.00/47,376.60 of		\$14,478.52	\$ 7,135.87
Less:			
Estimated tax paid before death	\$ 2,500.00		
Tax withheld from decedent's salary	921.50		3,421.50
	<hr/>	<hr/>	<hr/>
Tax as corrected			\$ 3,714.37

Exhibit "A"—(Continued)

Explanation of Adjustment—(Continued)

(e) Support of Dependents—Schedule L-4

	Returned	Determined
Item 1—Family allowance	\$27,000.00	\$ 9,000.00
Decrease		\$18,000.00

It has been determined that monthly allowance of \$1,000.00 is a reasonable allowance to the widow. Estate tax has therefore been increased by \$18,000.00 as follows:

	Returned	Determined
Family allowance as corrected		
18 months at \$1,000.00 a month		\$18,000.00
Community one-half share		9,000.00
Family allowance claimed		27,000.00
Decrease		\$18,000.00

(f) Marital deduction	\$61,077.55	\$ 0.00
Decrease		\$61,077.55

Inasmuch as the entire estate of the decedent and his spouse has been determined as community property no marital deduction is allowable.

(g) Stocks and Bonds—Schedule B

	Returned	Determined
Item 1—Transamerica Corporation	\$ 15,500.00	\$ 7,875.00
Item 2—National Automotive		
Fibres, Inc.	17,000.00	8,375.00
Dividend	0.00	200.00
Item 3—Bendix Aviation		
Corporation	2,700.00	5,100.00
Item 4—California Jockey Club	7,350.00	3,937.50
Item 5—Pacific Turf Club, Inc.	3,200.00	1,700.00
Item 6—Italo Petroleum Corporation		
of America	670.00	340.00
Item 7—Les Vogel Chevrolet		
Company	300,000.00	300,000.00
Item 9—25-year Mortgage & Trust		
Fund Bond, The Olympic Club ..	125.00	62.50
	<hr/>	<hr/>
	\$346,545.00	\$327,590.00
Decrease		\$ 18,955.00

Exhibit "A"—(Continued)

Explanation of Adjustment—(Continued)

Dividend shown on item 2 was payable to stockholders of record prior to the date of death and has therefore been held as belonging to decedent.

Item 3 has been corrected to the mean between the high and low sale quotation on Bendix Aviation Corporation as reported on the New York Stock Exchange.

Item 6 was understated in the amount of \$10.00

All items have been corrected to show the community one-half interest.

Computation of Estate Tax

	Returned	Determined
Gross estate	\$418,282.55	\$435,472.64
Deductions for basic tax	217,878.44	121,173.87
Net estate for basic tax	\$200,404.11	\$314,298.77
Net estate for additional tax	\$240,404.11	\$354,298.77
Gross basic tax	\$ 9,071.95	
Credit for State inheritance, etc. taxes	7,257.56	
Gross basic tax less credit		\$ 1,814.39
Total gross taxes (basic and additional) \$	99,075.61	
Gross basic tax	9,071.95	
Gross additional tax		90,003.66
Total net basic and additional taxes		\$ 91,818.05
Total estate tax payable		\$ 91,818.05
Estate tax assessed:		
Original,		
First California District		62,216.17
Deficiency of estate tax		\$ 29,601.88

Served April 27, 1955.

[Endorsed]: T.C.U.S. Filed April 26, 1955.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioners admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a)-(c), inclusive. Denies that the Commissioner erred in the determination of the deficiency as alleged in paragraph 4 of the petition and subparagraphs (a) to (c), inclusive, thereunder.

5(a). Admits that on January 15, 1934, Les Vogel Chevrolet Company was organized to operate an automobile agency and the stock of said corporation was community property of the decedent and Elizabeth S. Vogel, his wife; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c). Admits that a boat was owned by the decedent and his estate, but denies the remaining allegation contained in subparagraph (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
T. M. Mather, Assistant Regional Counsel, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed June 7, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that the following facts may be considered as true without prejudice to the right of either party to introduce further and other evidence not inconsistent with this stipulation.

1. On January 15, 1934 the Les Vogel Chevrolet Company was incorporated to operate an automobile agency.

2. In 1942, to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business, and for other reasons, decedent decided to dissolve the corporation and form a limited partnership. Substantially all records of the dissolved corporation, including the stock certificate book and minutes, have been destroyed.

3. From information available, the resolution contained in the corporate minutes relative to the

dissolution was as follows: "Resolved—That the assets of this corporation be transferred to Les Vogel as of Midnight, December 31, 1942." The corporation balance sheet submitted with the 1942 income tax return showed a net worth as follows:

Capital stock	\$20,160.00
Paid-in-surplus	28,750.00
Earned surplus	50,533.11
	<hr/>
	\$99,443.11
	<hr/> <hr/>

4. The opening entries in the partnership ledger show the following capital accounts:

Les Vogel	\$ 33,147.71
Les Vogel, Jr.	33,147.70
Mrs. Les Vogel	33,147.70
	<hr/> <hr/>

5. The partnership agreement was executed on February 6, 1943 and names decedent's wife and son as limited partners with decedent as a general partner for a term of 10 years from January 1, 1943, each having an equal share in the profits.

6. Decedent's son, Les Vogel, Jr., acquired by purchase a one-third interest in the business. He gave a note for the purchase price. Profits attributable to the son's one-third interest were applied against the note until the full amount was liquidated in April, 1946. The son has been recognized as a valid partner for years subsequent to 1942.

7. On September 25, 1945, on the son's return

from military service, the partnership agreement was changed to make the son a general partner.

8. On November 1, 1946, the business was incorporated. The partnership balance sheet, as of October 31, 1946, filed with the application for incorporation showed the following accounts involving the partners:

Accounts payable:

Les Vogel	\$ 66,083.09
Elizabeth Vogel (Mrs. Vogel) .	73,880.64
Les Vogel, Jr.	37,664.26
	<hr/>
	\$177,627.99
	<hr/> <hr/>

Partners' capital:

Les Vogel	\$ 32,709.22
Elizabeth Vogel	32,709.20
Les Vogel, Jr.	32,709.20
	<hr/>
	\$ 98,127.62
	<hr/> <hr/>

9. The opening balance sheet for the corporation as of November 1, 1946 showed the following:

Capital stock	\$150,000.00
	<hr/> <hr/>

Accounts payable:

Les Vogel and Elizabeth Vogel	\$105,382.15
Les Vogel, Jr.	20,373.46
	<hr/>
	\$125,755.61
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10. In order to provide the \$50,000.00 payment by each partner for the stock issued, the amounts necessary to bring the partnership capital accounts up to \$50,000.00 were taken from the accounts payable accounts.

11. Capital stock was subsequently increased to a stated value of \$300,000.00 with 30,000 shares outstanding. At the time of decedent's death, the decedent, Vogel and Les Vogel, Jr., each held 10,000 shares.

12. Decedent's probated will was executed on December 13, 1946, and provided in pertinent part as follows:

"Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dispose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. * * *"

"Sixth:—(e) All my other jewelry, my household furnishings and furniture, and my family residence at San Francisco * * * give to my beloved wife, Elizabeth, to have and to hold forever."

13. The residence mentioned above was held in the name of decedent and his wife as joint tenants and had been so held since it was acquired in 1941.

14. On the partnership books, separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to the wife's drawing account was a monthly allowance of \$100.00 and a \$500.00 monthly payment on an F.H.A. loan on the family residence. Taxes on the residence were charged to decedent's drawing account.

15. The balances in the separate drawing accounts of the decedent and his wife on the partnership books were combined into one account on the books of the present corporation. Against this account, various investments and personal expenses of the decedent were charged, along with other charges. With the exception of income tax, the only charge to this account specifically applicable to decedent's wife was a \$3,000.00 gift to their son. A similar \$3,000.00 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance in the account was divided into two equal parts of \$11,662.05. One part was deposited to a savings account, No. 3139, with the Bank of America, Marina Branch, in the name of Elizabeth Vogel. The other part was deposited in a savings account, No. 1421 at the Polk-Van Ness Branch of the Bank of America in the name of Les or Elizabeth Vogel.

16. Decedent and his wife had separate brokerage accounts with Dean Witter and Co. Decedent's account was opened in 1946 and his wife's in 1948. Purchases by decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946 and to their drawing account on the corporations' books subsequent to that date. Investments in wife's brokerage account were paid from a checking account at the Marina Branch of the Bank of America, in the name of Les or Elizabeth Vogel.

17. Besides the checking account mentioned above, there were three savings accounts; one was in the name of Elizabeth Vogel at the Marina Branch of the Bank of America, Account No. 3139; one was in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of the Bank of America, Account No. 1421; and one was in the name of J. Les or Elizabeth Vogel at Branch 253 of the Bank of America, Account No. 4214. As noted above, \$11,662.05 representing one-half of the remaining balance of their drawing account on the corporate books was transferred to the savings account in the name of Elizabeth Vogel on October 31, 1947. Some of decedent's salary checks were also deposited to this account. Later these amounts were transferred to the checking account at the Marina Branch of the Bank of America in the names of Les or Elizabeth Vogel. One of the savings accounts, which was with the Polk-Van Ness Branch of the Bank of America, Account No. 1421, in the name of Les or Elizabeth Vogel, was not very active. The one-half of the re-

maining balance of their drawing account was deposited to this account on October 31, 1947. It was subsequently withdrawn. The other savings account was with Branch 253 of the Bank of America in the name of J. Les or Elizabeth Vogel, Account 4214. The principal deposits to this account were salary checks of the decedent. Decedent's wife apparently made most of these deposits and it was her practice to retain \$100.00 to \$300.00 from these checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account in the Marina Branch in the name of Les or Elizabeth Vogel.

Not all salary checks were deposited in the savings accounts. A number of them were deposited to the above checking account. As noted above, transfers were made from time to time from the savings accounts to the said checking account. From the said checking account, decedent also made payments for his own individual expenditures, joint living expenses, and investments to his wife's name.

19. Separate Federal returns were filed for years 1946 and 1947 and joint returns for years 1948, 1949 and 1950. Separate State returns were filed for the entire period, 1946 through 1950. On all separate returns, Federal and State, income from whatever source was divided evenly between the separate returns. This was true of dividends from stock registered in decedent's name and his wife's, or both names jointly. It was also true of capital gain or loss on the sale of such securities. On the 1947 Federal return, the capital gains on the sale of securities

were described as community. On the 1947 State return, the total income reported was described as community.

/s/ GRANT G. CALHOUN,
Counsel for Petitioners.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

GGC:jr 6/20/57

[Endorsed]: T.C.U.S. Filed June 20, 1957.

30 T. C. No. 12

Tax Court of the United States

Estate of J. Leslie Vogel, Robert G. Partridge and
Elizabeth S. Vogel, Executors, Petitioners, v.
Commissioner of Internal Revenue, Respondent.

Docket No. 57535. Filed April 28, 1958.

FINDINGS OF FACT AND OPINION

1. Held, the evidence failing to establish that a transmutation took place, respondent correctly determined that the entire gross estate of J. Leslie Vogel and Elizabeth Vogel was community property.

2. Held, the evidence does not establish that a family allowance in excess of \$1,000 per month for 18 months was a reasonable and proper deduction from the gross estate.

Grant G. Calhoun, Esq., for the petitioners.

Aaron S. Resnik, Esq., for the respondent.

The respondent determined a deficiency in Fed-

eral estate tax for the estate of J. Leslie Vogel in the amount of \$29,601.88.

Two basic issues are presented. The first, whether respondent properly included in decedent's gross estate as community property the assets standing in the name of decedent and in the name of Elizabeth Vogel.

The second issue is whether respondent correctly reduced a deduction for the allowance granted decedent's widow by the California court during the settlement of the estate from \$1,500 per month to \$1,000 per month.

Petitioners concede that \$5,400 expended for maintenance and upkeep of a boat was not deductible as an administration expense.

The status of assets reported on the estate tax return as joint property was not put in issue by the pleadings.

Findings of Fact

Some of the facts are stipulated, the stipulation being incorporated herein by this reference.

Decedent, J. Leslie Vogel, died August 16, 1950, a resident of California. A Federal estate tax return was filed on February 15, 1952, by the executors of his estate with the collector of internal revenue for the First District of California.

On January 15, 1934, the Les Vogel Chevrolet Company was incorporated to operate an automobile agency. The stock of the corporation was community property of J. Leslie Vogel (hereinafter referred to as decedent or Les Vogel), and his wife,

Elizabeth S. Vogel (hereinafter sometimes referred to as Elizabeth Vogel or Elizabeth.)

In 1942, decedent, in order to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business, and for other reasons, decided to dissolve the corporation and to form a limited partnership. The corporate minutes indicate that the assets of the corporation were transferred to decedent as of midnight, December 31, 1942. A resolution was written in 1942 looking to the dissolution of the corporation. The partnership agreement was executed on February 6, 1943, and named Elizabeth Vogel and Les Vogel, Jr., as limited partners, with decedent as a general partner for a term of ten years from January 1, 1943, each having an equal share in the profits. The opening entries in the partnership ledger show the following capital accounts:

Les Vogel	\$33,147.71
Les Vogel, Jr.....	33,147.70
Mrs. Les Vogel.....	33,147.70

Separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to Elizabeth's drawing account was a monthly allowance of \$100 and a monthly payment of \$500 on an F.H.A. loan on the family residence. Taxes on the residence were charged to decedent's drawing account.

On November 1, 1946, the business was again incorporated. The partnership balance sheet, as of Oc-

tober 31, 1946, filed with the application for incorporation, showed the following:

Accounts payable:

Les Vogel	\$ 66,083.09
Elizabeth Vogel (Mrs. Vogel)	73,880.64
Les Vogel, Jr.....	37,664.26
	<hr/>
	\$177,627.99

Partners' capital:

Les Vogel	\$ 32,709.22
Elizabeth Vogel	32,709.20
Les Vogel, Jr.....	32,709.20
	<hr/>
	\$ 98,127.62

The opening balance sheet for the corporation showed the following:

Capital stock	<u><u>\$150,000.00</u></u>
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Accounts payable:

Les Vogel and Elizabeth Vogel	\$105,382.15
Les Vogel, Jr.....	20,373.46
	<hr/>
	<u><u>\$125,755.61</u></u>

In order to provide a \$50,000 payment by each partner for the stock issued, the amounts necessary to bring each of the partnership capital accounts up to \$50,000 were taken from the accounts payable.

One-third of the stock in the new corporation was issued to each of the former partners. Decedent and Elizabeth held theirs individually in their own names. The value of the capital stock was subsequently increased to \$300,000 with 30,000 shares outstanding. At the time of decedent's death, decedent, Elizabeth, and Les Vogel, Jr., each held 10,000 shares.

Decedent and Elizabeth maintained two savings accounts in both their names, a savings account in the name of Elizabeth Vogel, and a checking account in the names of Les or Elizabeth Vogel.

Following the dissolution of the partnership the separate drawing accounts of decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of decedent, along with other items, were charged against this account. With the exception of income tax, the only charge to the account specifically applicable to Elizabeth was a \$3,000 gift to their son. A similar \$3,000 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance was divided into two equal parts of \$11,662.05. One part was deposited in the savings account at the Marina Branch of the Bank of America in the name of Elizabeth Vogel. Some of decedent's salary checks were also deposited there. Later, these amounts were transferred to the checking account.

The other portion of the drawing account was deposited in the savings account in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of

the Bank of America. It was subsequently withdrawn.

The principal deposits to the savings account in the name of J. Les and Elizabeth Vogel at Branch 253 of the Bank of America were salary checks of the decedent. Elizabeth made most of these deposits; it was her practice to retain \$100 to \$300 from the checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account.

Not all salary checks were deposited in the savings accounts; a number were deposited in the checking account. Decedent made payments from the checking account for his own individual expenditures, for joint living expenses, and for investments in Elizabeth's name.

Decedent and Elizabeth maintained separate brokerage accounts, decedent's account being opened in 1946 and Elizabeth in 1948. Purchases by decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in Elizabeth's brokerate account were paid for from the checking account.

Payment for 467 shares of Bank of America stock standing in Elizabeth Vogel's name was also made from the checking account.

In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, Les Vogel, Jr., and Dorothea Vogel. Each contributed \$10,000 to the

initial capital. Elizabeth obtained the necessary funds from previous investments.

About 1950 Elizabeth purchased a parcel of real property from Arthur M. Hardy, an old friend of the family. Hardy then designed and built the Anzavista Apartments on the property. All of Hardy's negotiations in the matter were with Elizabeth and the apartments were built for her. The record is inconclusive as to the source of the funds for the apartment venture.

During a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista's property as decedent's. She further represented that whatever property she and decedent had belonged to both of them. At the trial Elizabeth referred to the Anzavista property as "the whole family's."

The tax returns of decedent and Elizabeth Vogel for 1940 and all subsequent years were prepared by Lawrence H. Goebel, a certified public accountant. The information for these returns was mostly obtained from the office manager of the Les Vogel Chevrolet Company. Goebel reviewed the returns with the decedent, but could not recall discussing the nature of the property with him. Goebel assumed that the income from the various sources was community property, to be split accordingly.

Separate Federal returns were filed for the years 1946 and 1947, and joint returns for the years 1948, 1949, and 1950. Separate state returns were filed for the entire period 1946 through 1950. Historically, dividends were divided between decedent and Eliza-

beth Vogel. This was also true of dividends from stock registered in decedent's or Elizabeth Vogel's name, or both names jointly. It was true of capital gain or loss on the sale of such securities. The dividends from the Les Vogel Chevrolet Company were always divided equally between decedent and Elizabeth Vogel.

On the 1947 Federal return the capital gains on the sale of securities were described as community. On the 1947 state returns the total income reported was described as community.

Upon the advice of attorneys, decedent's and Elizabeth Vogel's dividends were segregated for the first time on the 1950 state tax returns filed after decedent's death.

Robert G. Partridge was decedent's personal attorney for approximately 15 years, beginning in the mid-1930's. Partridge and his associate, Wallace O'Connell, prepared two wills for decedent. The first will was executed December 13, 1946. The second was never signed.

The first will contained the following provisions:

Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dispose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have

elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. She shall, in any event, however, be entitled to exempt property and family allowance out of my estate.

Notes taken by Partridge during a discussion with decedent prior to the drafting of the first will included the words "transmutation agreement (Jan. 1, '43)." Partridge had had no independent knowledge on this subject and wrote down only what information decedent communicated to him. At no time during their discussions concerning the will did decedent show Partridge any written agreement which would have transmuted community to separate property.

Decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company.

The second, and unsigned, will was drafted for decedent in 1950. A draft of a proposed will for Elizabeth Vogel was prepared at approximately the same time. Both drafts refer to a written agreement converting their community property to separate property.

During discussions concerning the second will Partridge suggested to decedent that it would be best to have some expression of the transmutation agreement in writing. No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written.

Partridge did not know in fact whether there ever was a transmutation.

At the time of decedent's death, decedent, Elizabeth Vogel, their son Les Vogel, Jr., and their daughter Dorothea lived in a three-story detached dwelling at 369 Marina Boulevard, San Francisco. Both Les, Jr., and Dorothea were over 21. The residence, located in a wealthy neighborhood, had been acquired in 1941 and was held in the name of Les Vogel and Elizabeth Vogel as joint tenants.

They employed a full-time maid and a gardener; the maid "lived in". Elizabeth also, on occasion, employed caterers; she entertained approximately once a month.

During his lifetime most of decedent's salary, which was about \$1,800 a month, was expended in maintaining the home.

After decedent's death, Les Vogel, Jr., and Dorothea continued to occupy the house with their mother and a servant. Neither Les Vogel, Jr., nor Dorothea made any contribution to the maintenance of the home, either before or after decedent's death.

On September 7, 1950, Elizabeth Vogel filed a petition with the Superior Court of the State of California, San Francisco County, for a family allowance of \$1,500 a month from the estate of J. Leslie Vogel. On September 19, 1950, the Judge of the Superior Court entered an order granting the allowance. During the probate of the estate, checks totalling \$27,000 were paid to Mrs. Vogel as a family allowance.

Decedent's will was admitted to probate and

Elizabeth Vogel filed an election to take under its provisions on September 12, 1952.

A Federal estate tax return was filed on February 15, 1952. Various securities and miscellaneous assets were treated on the return as decedent's separate property. No reference was made to certain property standing in the name of Elizabeth Vogel alone. Deductions were claimed on the return for a bequest to surviving spouse (marital deduction) of \$61,077.55 and an allowance for support of dependents (family allowance) paid to Elizabeth Vogel totalling \$27,000 (\$1,500 per month for 18 months).

The respondent determined that the entire gross estate of decedent and Elizabeth Vogel was community property and recomputed the tax on a community property basis. The following assets standing in the name of Elizabeth Vogel were added to the gross estate:

4 shares Pacific Turf Club stock	\$1,700.00
500 shares Pacific Gas & Electric redeemable first preferred stock	7,156.25
467 shares Bank of America stock	6,333.69
217 shares Pacific Gas & Electric common stock	3,499.13
250 shares Leslie Financing Company	5,627.62
Anzavista Apartments property	8,800.00
Savings account, Marina Branch of Bank of America	1,181.74

Respondent decreased all expenses of administration, funeral expenses, and debts of the decedent by one-half, except \$5,400 for maintenance and upkeep of a boat, which amount was totally disallowed. This disallowance of \$5,400 is not contested

by petitioners. The marital deduction was also disallowed. The family allowance was decreased from \$1,500 per month for 18 months to \$1,000 per month for the same period; one-half the total sum was permitted as a deduction. Respondent determined a deficiency of \$29,601.88 in the return.

Opinion

Van Fossan, Judge: The first question is whether respondent correctly determined that all the assets standing in the name of decedent and all those standing in the name of Elizabeth Vogel were community property.

Petitioners contend that the community interest of decedent and Elizabeth in the Les Vogel Chevrolet Company was transmuted to separate property by oral agreement on January 1, 1943. Petitioners further contend that certain assets standing in the name of Elizabeth Vogel alone were purchased with income derived from her separate interest in the Chevrolet Company and thus were her separate property.¹

In California, community property may be transmuted to separate property by oral agreement be-

¹ Cal. Civ. Code:

Sec. 162. Separate property; wife:

Separate Property of the Wife.—All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

tween the spouses.² *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905 (1944). It is not always necessary to show an express oral agreement; the status of the property may be demonstrated by the nature of the transaction or appear from the surrounding circumstances. *Long v. Long*, 88 Cal. App. 2d 544, 199 P. 2d 47 (1948). It should be noted, however, that property acquired by either the husband or the wife, or both, after marriage is presumed to be community property, and one asserting that such property is separate rather than community has the burden of establishing that fact.³ *Wilson v. Wilson*, 76 Cal. App. 2d 119, 172 P. 2d 568 (1946).

² Cal. Civ. Code:

Sec. 158. Contracts with each other and third persons:

Husband and Wife May Make Contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on Trusts.

³ Cal. Civ. Code:

Sec. 164. Community property; presumptions as to property acquired by wife; limitation of actions:

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but whenever any real or personal property, or any interest therein or encumbrance

There is a disputable presumption in California law that property acquired by a married woman by an instrument in writing is her separate property.⁴ *Nichols v. Mitchell*, 32 Cal. 2d 598, 197 P. 2d 550 (1948). Petitioners, however, may not depend on this presumption alone to overcome the respondent's determination that the property in question is community. Cf. *Shea v. Commissioner*, 81 F. 2d 937 (C.A. 9, 1936), affirming 30 B.T.A. 1265.

thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

⁴ Cal. Civ. Code, sec. 164, *supra*.

Petitioners rely heavily upon the testimony of Robert G. Partridge, decedent's personal attorney for 15 years. Partridge and his associate, Wallace O'Connell, prepared two wills for decedent. The first was executed on December 13, 1946, and was admitted to probate following decedent's death. It provided, *inter alia*, that

All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property.

The second will was drafted for decedent in 1950. It was never signed. A draft of a will for Elizabeth was prepared at approximately the same time. Both refer to a written agreement transmuting community property to separate property, but no direct evidence of such a written agreement was introduced at the trial.

Notes taken by Partridge during a discussion with decedent prior to the drafting of the first will include the words "transmutation agreement (Jan. 1, '43)." Partridge testified that he had no independent knowledge on this subject and wrote down only what information decedent communicated to him. At no time during these discussions did decedent show Partridge any written agreement which would have transmuted community to separate property.

Decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company.

Decedent was unable to explain to Partridge why Elizabeth's interest in the Chevrolet Company was her separate property. Partridge stated that he did not know in fact if there ever was a transmutation.

During discussions concerning the second will Partridge suggested to decedent that it would be best to have some expression of the transmutation agreement in writing. This was never done.

The specific language of the wills fails to support petitioners' argument. The first will does not refer to a transmutation agreement and states that all property standing in decedent's or in decedent's and Elizabeth's name is community property.

The draft of decedent's second will and the draft of Elizabeth's will both refer to a written transmutation agreement, but, as noted above, the existence of this writing has not been established. It can only be inferred that if such an agreement was contemplated it had not reached accomplishment at the time of decedent's death.

The fact that Elizabeth became a limited partner in the Les Vogel Chevrolet Company on February 6, 1943, and later, when the business was re-incorporated, held one-third of the stock in her own name does not establish that her interest was separate property.

In *George W. Van Vorst*, 7 T. C. 826 (1946), a California case in which both husband and wife were among the partners in an enterprise, this Court, after surveying the law, concluded (p. 830):
that if any part of the capital investment of

the petitioner [husband] in the partnership was previously community property, it was not transmuted into his separate property by virtue of the partnership agreement.

Naked legal title is of little value in determining whether property is community or separate. *Tomaier v. Tomaier*, *supra*.

Assuming that an agreement transmuting community to separate property had been arrived at, its existence would, of necessity, have been within the knowledge of Elizabeth Vogel. Although she testified at length for the petitioners, she was at no time asked whether a transmutation agreement had ever been discussed by her and her husband, or if such existed.

It is well established that failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable. *Wichita Terminal Elevator Co.*, 6 T. C. 1158, *affd.* 162 F. 2d 513 (C.A. 10, 1946). This is especially true when the party failing to produce the evidence has the burden of proof. *Wichita Terminal Elevator Co.*, *supra*.

After considering all the evidence we are convinced that petitioners have not sustained their burden of proof and have failed to show that a transmutation took place.

Petitioners concede on brief that originally all the property owned by decedent and Elizabeth Vogel was community property. Since we have con-

cluded that petitioners have failed to show a transmutation from community to separate property, all the assets standing in the name of decedent or in the name of Elizabeth Vogel, including the Chevrolet property, must be regarded as community property. The pleadings raise no issue as to the jointly held property, nor does petitioner raise any issue as to respondent's adjustments of administration expenses and similar expenditures, excepting the family allowance as to the widow.

We hold that respondent correctly determined that the entire gross estate of decedent and Elizabeth Vogel was community property.

The last question is whether decedent's estate is entitled to a deduction for family allowance of \$1,500 per month for the support of decedent's widow, or \$1,000 per month, as determined by the respondent.

Pursuant to section 812(b)(5) of the Internal Revenue Code of 1939, an estate may deduct such amounts as

reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered * * *.

Regulations 105, section 81.40, provides that the support of dependents of the decedent during the settlement of the estate is deductible but pursuant to the following rules:

(a) In order to be deductible, the allowance must be authorized by the laws of the jurisdiction in which the estate is being administered, and not in excess of what is reasonably required.

(b) The allowance for which deduction may be made is limited to support during the settlement of the estate. Any allowance for a more extended period is not deductible.

(c) There must be an actual disbursement from the estate to the dependents, but after payment has been made the right of deduction is not affected by the fact that the dependents do not expend the entire amount for their support during the settlement of the estate.

California grants "such reasonable allowance" to the widow during the settlement of the estate as should be necessary for her maintenance according to her circumstances. Under the California statute, included with the widow were the minor children, if any. The law was changed recently by adding to the family, adult children who have been declared incompetent by the court. The two children of decedent who lived in the family home both before and during the settlement of the estate and made no contribution thereto were adults and had not been declared incompetent. Thus it is that the two children were excluded and the family allowance was exclusively for the support of the widow.

The decedent, according to the record, spent most of his monthly salary of \$1,800 in maintaining the home, but it should be remembered that he provided maintenance for four persons, namely, himself, his

wife, and two adult children, while the allowance during the settlement of the estate was for the support of the widow only. If decedent was able to provide maintenance for the family of four in the home for less than \$1,800 per month, it would seem to follow that respondent's allowance of \$1,000 per month for maintenance of the widow alone was adequate and reasonable for her support and this in the manner and style previously obtaining. We have very little evidence of the actual cost of maintaining the home, either before or during the settlement of the estate. Suffice it to say, petitioner has not demonstrated or proved that respondent's allowance was inadequate.

Decision will be entered under Rule 50.

Served April 28, 1958.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation reflecting a deficiency in estate tax in the amount of \$29,601.88 is submitted on behalf of the respondent in compliance with the opinion of the Court determining the issues in this proceeding. The decedent died on August 16, 1950.

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pur-

suant to the statute in such cases made and provided.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
Aaron S. Resnik, Attorney, Internal Revenue
Service, 1069 Flood Building, San Francisco 2,
California.

Ap:SF:AA:ENJ

Computation Statement

In re: Estate of J. Leslie Vogel, Robert G. Part-
ridge and Elizabeth S. Vogel, Executors, 1710
Shell Building, San Francisco 4, California.

Docket No. 57535.

Date of Death—August 16, 1950.

	Estate Tax
Deficiency	\$29,601.88

Recomputation of tax liability has been prepared
in accordance with the opinion of The Tax Court
of the United States filed April 28, 1958.

STATEMENT OF ACCOUNT

Date of Death—August 16, 1950

Estate tax paid (and assessed)	\$ 62,216.17
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Payments as follows:

Paid Feb. 15, 1952

Original	\$62,216.17
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Total payments	\$62,216.17
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Liability	91,818.05
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Unpaid deficiency in estate tax	\$ 29,601.88
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Return filed February 15, 1952.

Statutory notice mailed February 14, 1955.

Adjustments to Net Estate

Net estate for basic tax as disclosed by statutory notice	\$314,298.77
Net estate for basic tax as revised in accordance with the opinion of The Tax Court of the United States (unchanged)	\$314,298.77
Net estate for additional tax, (unchanged)	\$354,298.77

Computation of Estate Tax

Gross estate	\$435,472.64
Deductions for basic tax	121,173.87
Net estate for basic tax	\$314,298.77
Net estate for additional tax	\$354,298.77
Gross basic tax	\$ 9,071.95
Credit for State inheritance, etc. taxes	7,257.56
Gross basic tax less credit	\$ 1,814.39
Total gross taxes (basic and additional)	\$99,075.61
Gross basic tax	9,071.95
Gross additional tax	90,003.66
Total net basic and additional taxes	\$ 91,818.05
Total estate tax payable	\$ 91,818.05
Estate Tax assessed, Original First California District	62,216.17
Deficiency in estate tax	\$ 29,601.88

[Endorsed]: T.C.U.S. Filed June 24, 1958.

[Title of Tax Court and Cause.]

PETITIONERS' OBJECTIONS TO COMPUTATION OF RESPONDENT UNDER RULE 50

Petitioners object to the computation of Respondent for the following reasons:

(1) Attorney fees paid to Petitioners' counsel (subsequent to the filing of the petition) in the amount of \$1,000.00 have not been taken into account as a deduction from the gross estate. Evidence thereof is in the transcript (page 155).

(2) Funeral expenses have been deducted only to the extent of one-half the amount thereof, or \$1,588.57, rather than in the full amount of \$3,177.14. It is considered that the allowance thereof in full is solely a question of law.

Attached hereto is Petitioners' alternative computation reflecting the above objections.

/s/ GRANT G. CALHOUN,
Counsel for Petitioners.

Adjustments to Net Estate

Net estate for basic tax as disclosed	
by statutory notice	\$314,298.77
Net estate for basic tax as revised in	
accordance with objections to computation of	
respondent (less \$2,588.57)	\$311,710.20
Net estate for additional tax revised in accordance	
with objections to computation of respondent	\$351,710.20

Computation of Estate Tax

Gross estate	\$435,472.64
Deductions for basic tax	123,762.44
<hr/>	
Net estate for basic tax	\$311,710.20
Net estate for additional tax	\$351,710.20
Gross basic tax	\$ 8,968.41
Credit for State inheritance, etc. taxes	7,174.73
<hr/>	
Gross basic tax less credit	\$ 1,793.68
Total gross taxes (basic and additional)	\$98,247.20
Gross basic tax	8,968.41
<hr/>	
Gross additional tax	89,278.79
<hr/>	
Total net basic and additional taxes	\$ 91,072.47
Total estate tax payable	\$ 91,072.47
Estate Tax assessed, Original First California District	62,216.17
<hr/>	
Deficiency in estate tax	\$ 28,856.30

Served August 1, 1958.

[Endorsed]: T.C.U.S. Filed July 31, 1958.

Tax Court of the United States
Washington

Docket No. 57535

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

The Court's Opinion was filed April 28, 1958 and on June 24, 1958, pursuant thereto, respondent filed a computation for entry of decision. Petitioner filed on July 31, 1958, objections to respondent's computation and an alternative computation. Now, therefore, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of \$29,601.88.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered: August 8, 1958.

Served: August 8, 1958.

United States Court of Appeals
For the Ninth Circuit

T. C. Docket No. 57535

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Taxpayer, the petitioner in this cause, by Grant G. Calhoun, Counsel, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States handed down on August 8, 1958, T. C. Docket No. 57535, determining deficiencies in the petitioner's Federal estate tax in the amount of \$29,601.88, and respectfully shows:

I.

The petitioner, Estate of J. Leslie Vogel, Robert G. Partridge and Elizabeth S. Vogel, Executors, is an estate of J. Leslie Vogel, deceased, who died August 16, 1950, in San Francisco, California and estate tax return was filed with the Collector of Internal Revenue for the 1st District of California at San Francisco, California on or about the 15th day of February, 1952.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for Federal estate tax. There are four issues involved:

1. The character of certain property owned by decedent and his spouse, whether community property as claimed by the Commissioner or whether separate property or joint tenancy property so as to qualify for the marital deduction. In particular whether or not certain interests in the Les Vogel Chevrolet Co. had been transmitted into separate property from community property at some time exclusive of the year 1942 and prior to April 2, 1948.

2. The reasonableness of the family allowance.

3. Whether, administration, family allowance and funeral expenses are deductible in full or on a community property basis as determined by the Commissioner.

4. Whether legal expenses incurred after filing of petition in the Tax Court are deductible.

III.

That said Taxpayer, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GRANT G. CALHOUN,

Counsel for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed September 15, 1958.

[Title of Tax Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review heretofore filed by the Taxpayer:

(1) The docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court, as follows:

(a) Petition.

(b) Answer.

(3) The findings of fact and opinion of the Tax Court.

(4) The decision of the Tax Court.

(5) The petition for review.

(6) The official transcript of oral testimony, pages 1 to 197 inclusive.

(7) The exhibits introduced in evidence.

(8) This designation of contents of record on review.

/s/ GRANT G. CALHOUN,
Attorney for Petitioners.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed December 17, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designations of Contents of Record," including Joint Exhibits A-1, B-2, Petitioners' Exhibits 3, 4, Joint Exhibits C-5, D-6, Petitioners' Exhibits 7 thru 14, 15 (Respondent's Exhibit E, marked for identification), 16, Joint Exhibit H-17, Petitioners' Exhibits 18 thru 22, and Respondent's Exhibits F, G, I, J, and K, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket of my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 18th day of December, 1958.

[Seal] HOWARD P. LOCKE,

Clerk, Tax Court of the
United States.

The Tax Court of the United States

Docket No. 57535

In the Matter of:

ESTATE OF J. LESLIE VOGEL, et al.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Room 421, Customs Courtroom, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California. Monday, June 17, 1957.

The above-entitled matter came on for hearing, pursuant to Calendar Call, at 10:18 o'clock a.m.

Before: The Honorable Ernest H. Van Fossan.

Appearances: Grant G. Calhoun, of the law firm of Carlson, Collins, Gordon & Bold, 1017 Macdonald Avenue, Richmond, California, on behalf of the Petitioner. Aaron S. Resnik, on behalf of the Respondent. [1]*

Proceedings

The Clerk: Docket 57535, Estate of J. Leslie Vogel.

Mr. Calhoun: If your Honor please, I am Grant G. Calhoun and I have here an entry of appearance. I have been retained by the tax payers.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

I talked to Mr. Jacobs Friday, and he will be in Washington, D. C., and he is in Washington, D. C. right now, and I have here my appearance.

Mr. Resnik: Aaron S. Resnik appearing for the Respondent.

Your Honor, we are ready to try the case.

Mr. Calhoun: We are ready for trial too, your Honor, except we have one witness who is a CPA, a vital witness, who is in Las Vegas at this moment. He is going to Los Angeles and he will fly up, and I would like to have it set for Thursday or the first part of the following week, because he has to fly up here and he's an important witness in the case.

The Court: Set for 10:00 a.m. Thursday.

The Clerk: 10:00 a.m. Thursday morning.

The Court: How much time do you estimate on that last case?

Mr. Resnik: What is your estimate of the time?

Mr. Calhoun: Oh. I have about five or six witnesses. [2] They shouldn't take too long. It's a question of status of property, whether it's community property or what, and I don't know how long the cross examination will be.

The Court: What do you think?

Mr. Resnik: We have one witness, your Honor. I hadn't anticipated that the Petitioner would have that many witnesses. We are anticipating partial stipulation of facts.

In light of this development, I would think it might take one day.

The Court: Very well.

Mr. Calhoun: We intend to stipulate to a lot of facts, but I think there are some other matters that won't take so long, except we want them in the record.

(Whereupon, the hearing in the above-entitled matter adjourned until Thursday, June 20, 1957.) [3-4]

Thursday, June 20, 1957

Proceedings

The Clerk: Court is now in session, Judge Van Fossan presiding.

Docket No. 57535, Estate of J. Leslie Vogel.

State your appearances for the record, please.

Mr. Calhoun: Grant G. Calhoun for the Petitioner.

Mr. Resnik: Aaron S. Resnik for the Respondent. We are ready for trial.

The Court: What estimate do you have for the time of trial of this case, gentlemen?

Mr. Calhoun: I think the greater part of the day, if your Honor please. I have two witnesses, attorneys, that I would like to get here about 2 o'clock, if I could have them then. When does the Court convene in the afternoon?

The Court: At 2 o'clock.

Mr. Calhoun: Well, I think it will take the greater part of the day. I have about six witnesses altogether.

The Court: You may state the issues.

Mr. Calhoun: The issue is, without going into the individual items, the question of whether certain property is separate property of the husband and wife, that is, husband separate property and the wife separate property, or whether it is community property. We have a matter of family allowance, which is a question of whether that is allowable in the particular amount of \$1,500 a month, and there is a question [7] about a boat, expenses in regard to the boat during administration, and we are not contesting that point. We are, however, the family allowance.

The principal issue, however, in the case is the question of certain property, whether wife separate property and husband separate property or community property, and, of course, if it is separate property, there are deductions involved, and otherwise it will be treated in a different manner, which is the principal item of the deficiency.

Did you want my opening statement at this time, your Honor?

The Court: Whatever brief statement you may have.

Mr. Calhoun: Well, the facts are that the Les Vogel Chevrolet Company was organized in the early thirties as a corporation, and in December of

1942 the corporation was liquidated. At that time there were two children, Les Vogel, Jr., and a daughter, and of course the husband and wife. In 1943, beginning January 1, 1943, a limited partnership was organized, in which the wife, the husband and the son, Les Vogel, Jr., each had an equal share. This went on until 1946. I think it's very pertinent that the will—we have a stipulation which we have signed—the will which was admitted to probate was executed December 13, 1946. The 1st of November 1946 the partnership was liquidated and a new corporation was formed for the business and in that corporation each of the three [8] had a one-third interest, that is, the son, the mother and the husband, had a one-third interest in the stock, that is, the stock was issued one-third each in their respective names.

Mr. Vogel had his personal attorney who prepared the will. He also had another attorney who was Secretary of the Corporation, Mr. Skinner. His personal attorneys were Mr. Partridge and Mr. O'Connell. The attorney who incorporated the business in 1946 and handled the corporate affairs, Secretary of the Corporation, was Mr. Skinner. So the attorneys who prepared the will in 1946 did not do the incorporating and the will, as I say, was signed a month after, although we will show that preparation was commenced way before the actual incorporation.

Later on, in 1948, the decedent opened a brokerage account—he had had one since 1946 in his own name, but he opened one in 1948 in his wife's name, and many purchases were made, and that is one of

the questions, whether that property is community property or separate property.

I am trying to get my times in proper order here.

Approximately in 1950 Mr. Vogel went to his personal attorneys in regard to his will and they took certain information from him, made notes and prepared a draft of a new will, one for him and one for Mrs. Vogel, and he died before the will was ever signed, in August of 1950. So the will that was probated was the 1946 will. But I believe that this subsequent [9] information has a bearing on the treatment of this property, whether it was separate property or community property.

I might say, during this period Mr. Goebel, who is present here in Court now, is the CPA who handled the tax returns for all of them. He will testify as to exactly what he did. He split things, in some instances, exactly down the middle, as community property.

That is the substance of the contentions of the Petitioners.

Mr. Resnik: I believe Mr. Calhoun's characterization of the issue is unduly broad and doesn't necessarily give the Court a true picture of the nature of the controversy. To say we are concerned generally with whether certain property is separate or community may in a broad sense outline what is involved. More specifically, the pleadings in the case relate themselves solely as to the character of certain property, not all of the property. Basically that property is the interest of the decedent and his wife

in a business known as the Les Vogel Chevrolet Company, which was a corporation at the time of the decedent's death. The pleadings set forth that that corporation had its inception in 1934 and at the time of its inception was community property of the decedent and his wife and, in the absence of any proof of transmutation, that character of the property should continue throughout the decedent's death. Furthermore, even if the Petitioner were successful [10] in showing a transmutation that would not resolve the issue in the case as to the availability of the marital deduction to the estate whose tax is the subject of the controversy. If the transmutation took place in 1942, which is one of the dates Mr. Calhoun referred to, then under the statute such transmutation would not serve as a predicate for a marital deduction. Likewise, any property which was acquired out of the business of the Vogel Chevrolet Company after April 2nd, 1948, the effective date of the 1948 Revenue Act, would not qualify for the marital deduction because the statute expressly states that conversions of property from community to separate are not recognized for marital deduction purposes if they take place after that date. Accordingly it becomes necessary for the Petitioner, if the estate is to prevail here, to show a transmutation of what is admitted to be community property at the outset and that such transmutation took place at times when the statute would recognize that a marital deduction could flow. We believe that the Petitioner can show neither of these. The evidence is fairly conclusive that what was community at its inception has remained community property through-

out. In fact, we are almost confronted in this case with a situation where a plea of estoppel might well have been raised against the taxpayers. That has not been pleaded because the evidence of it has just come forward to us. However, we do believe that that evidence should be seriously considered [11] by the Court in commanding of this estate that it consistently treat the property as the decedent and his wife treated the property during his lifetime, that is, as community property. The evidence will show that to the extent that data were available to us in the form of retained copies of tax returns, that the parties treated the property as owned in community by them and did that consistently up to the time of the death of the decedent.

We further will show that the decedent in his own will gave certain characterization to the property. We will further show that the decedent's widow, during the probate of the estate, made representations that the property was community. In fact, I believe I can state to the Court that all of the documentary evidence that the Court will have before it will not only fail to support Petitioner's contention, but will affirmatively support Respondent's determination.

With reference to the other issue, that of the family allowance, the estate claimed an allowance of \$1,500 a month for approximately 27 months. There was allowed in the statutory notice an amount of \$1,000 per month. We believe that the amount of \$1,000 a month is more than reasonable, and we believe that evidence will show that if the Respondent

made any error in that regard, he erred on the side of being liberal instead of being conservative.

The Court: You may proceed with the evidence.

Mr. Calhoun: I have here the original of a stipulation which we have signed, your Honor. There were some corrections that we interlineated, which I put on one copy.

Mr. Resnik: May I make one correction in my statement, so that the Court will not be confused? I believe that I stated the family allowance was claimed for a period of 27 months. I have been advised that the family allowance was claimed for a period of 18 months.

Mr. Calhoun: I can furnish that shortly, rather than taking the time of the Court now.

The Court: You are submitting this stipulation?

Mr. Calhoun: Submitting the stipulation, yes.

The Court: It will be received.

Mr. Calhoun: I have a witness who has just arrived here from Southern California, that is the reason I asked for the case to be set for today, and I would like to call him first if there are no objections.

The Court: You may call your witness.

Mr. Calhoun: Mr. Goebel.

LAWRENCE H. GOEBEL

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name, if you please.

The Witness: Lawrence H. Goebel.

Direct Examination

Q. (By Mr. Calhoun): Please state your occupation. A. Certified public accountant.

Q. And how long have you been a certified public accountant? A. Since 1928.

Q. Did you have occasion to prepare tax returns for Lester Vogel or his spouse or the corporation or the partnership? A. I did.

Q. For what years, do you recall?

A. Well——

Q. Do you recall when you first started making returns for them?

A. To the best of my recollection, it's probably since 1939.

Q. And you have, then, made all their returns, during 1940 and all their returns subsequent to that date, right up to date? Is that true?

A. Yes, sir.

Q. That included the partnership returns from 1943 to the time of the incorporation in 1946?

A. Yes, it did.

(Testimony of Lawrence H. Goebel.)

Q. And you also made their personal returns, is that right? [14] A. Yes.

Q. We have stipulated that separate federal returns and state returns were filed for years 1946 and 1947 and joint returns for the years 1948, 1949 and 1950, and on all separate returns, federal and state, income from whatever source was divided evenly between the separate returns——

Mr. Resnik (interrupting): It has been stipulated, your Honor, it is the fact, we can't introduce any evidence on it. It would be inconsistent.

Mr. Calhoun: It is not inconsistent. He is going to say yes. I just want to identify it and——

Q. (By Mr. Calhoun): We have stipulated, on all separate returns, federal and state, income from whatever source was divided evenly between the separate returns.

Mr. Calhoun: I am going to withdraw my question and just say it was stipulated to that effect.

Q. (By Mr. Calhoun): It was also stipulated that this was true of dividends registered in decedent's name and his wife's, or both names jointly. It was also true of capital gain or loss on the sale of such securities. On the 1947 federal return, the capital gains on the sale of securities were described as community. On the 1947 state return, the total income reported was described as community. We have stipulated to that as a [15] fact and it is the fact, Mr. Goebel. Now, I would like to know from what source you derived your information as to the preparation of those returns.

(Testimony of Lawrence H. Goebel.)

A. Well, as to the partnership returns and the corporate returns, they were taken from the books of account. As to the personal returns of Les Vogel and his wife, Elizabeth Vogel, and Les Vogel, Jr., they were mostly taken from information submitted by the bookkeeper.

Q. By the bookkeeper, you mean?

A. The office manager.

Q. For the company?

A. For the Les Vogel Chevrolet Company.

Q. Did you personally ever discuss the nature of the returns, as to the nature of the property, whether it was community property, either with Mr. Vogel or Mrs. Vogel or their attorneys?

A. To the best of my recollection, there was no specific discussion that I recall. I more or less assumed that the income from these various sources was community income, split accordingly.

Q. From a tax standpoint, if it had been stated separately, from an income tax standpoint, would there have been a substantial difference in the income?

Mr. Resnik: I object to that question, your Honor, without having the returns before us and the nature of each [16] item before us.

The Court: I think your question is objectionable. You can lead up to that question all right.

Mr. Calhoun: I am unable to find the returns, your Honor. Mr. Jacobs, the other attorney in this case, is not available, he is in Washington, he is the attorney of record, and Mr. Goebel informed us that

(Testimony of Lawrence H. Goebel.)

Mr. Jacobs had the returns and I called Mr. Jacobs before he left and he said he didn't have them, and he is not here now, and I have no way of getting them, and I would like to make a further search. I am just interested in any one at random after '46, to go into the question of dividends, and how it was handled.

I have no further questions of Mr. Goebel.

Cross Examination

Q. (By Mr. Resnik): I believe you stated, Mr. Goebel, that you first undertook accounting work for Mr. Vogel and his family some time in 1939?

A. I believe that's the earliest date. I am not sure. It's been so long ago. But that is my recollection, the best recollection I have.

Q. What was the nature of the undertaking?

A. How do you mean that?

Q. Did they employ you as accountant, as their personal accountant, corporation accountant, accountant for all purposes? [17]

A. On their personal returns, and also on the corporation and the partnership, when it was in existence.

Q. Did you at that time discuss with Mr. Vogel the nature of his business, the nature of his assets?

A. You mean as to community or separate property and so forth?

Q. Generally, as to what he owned and what the problem would be, that you were confronted with.

A. I don't remember any specific discussion.

(Testimony of Lawrence H. Goebel.)

Undoubtedly he discussed various features of the business, but I don't remember any specific discussion along that line, as to community or separate.

Q. I didn't ask you that. When you prepared the first return for Mr. Vogel and Mrs. Vogel, did you discuss with them what you did on the return?

A. I obtained most of the information for the personal returns from their office manager.

Q. Who was the office manager?

A. Jimmy Doyle.

Q. Was Jimmy Doyle with them at the time you came?

A. I don't recollect when he went with the business. It may have been some other office manager at the start. I don't recall.

Q. With whom did you discuss the matters of preparation of the first returns? [18]

A. Well, with the office manager and——

Q. Who was the office manager?

A. I don't recall when Jimmy Doyle went with them. This has all been so long ago that I just don't recollect.

Q. Do you generally follow the practice of preparing returns for individuals without discussing the returns with them?

A. Oh, no. I discuss the returns with — mostly with Mr. Vogel I discussed them.

Q. You discussed the returns prepared for Mr. and Mrs. Vogel with them?

A. Mostly with Mr. Vogel, and the office return.

(Testimony of Lawrence H. Goebel.)

Q. And he discussed the returns, and they were filed? A. Yes.

Q. Did he review them with you?

A. Usually.

Mr. Resnik: Will you mark this, please?

The Clerk: 1942 return of Mrs. Les Vogel, Respondent's Exhibit A for identification.

Exhibit B is the 1942 return of Les Vogel, for identification.

(Respondent's Exhibits Nos. A and B, respectively, were marked for identification.)

Q. (By Mr. Resnik): I show you, Mr. Vogel, Respondent's Exhibits A and B for identification, being pencilled copies of 1942 individual [19] tax returns, federal tax return Forms 1040, one in the name of Mrs. Les Vogel and one in the name of Les Vogel, and I ask you whether they come from your files. A. Yes, they do.

Q. Are those retained copies, retained pencilled copies, of the federal tax returns filed by Mr. and Mrs. Vogel for the year 1942?

A. They appear to be.

Mr. Resnik: I offer at this time as Respondent's Exhibit A the retained copy of the 1942 individual income tax return, Form 1040, of Mrs. Les Vogel.

The Court: Retained by the Petitioner?

Mr. Resnik: Yes.

The Court: Taken from his files?

Mr. Resnik: Yes.

Mr. Calhoun: I would like to join in the offer.

Mr. Resnik: Then we offer as Exhibit A the re-

(Testimony of Lawrence H. Goebel.)

tained copy of the federal return of Mrs. Vogel and as Exhibit B the retained copy of the federal return of Les Vogel.

The Court: They will be received. Do you have any objection to making them a joint exhibit?

Mr. Resnik: No, I have no objection.

The Court: They will be marked Exhibits A-1 and B-2.

(Respondent's Exhibits Nos. A and B, heretofore marked for identification as Respondent's [20] Exhibits Nos. A and B, respectively, for identification, were received in evidence as Respondent-Petitioner's Joint Exhibits Nos. A-1 and B-2.)

Mr. Resnik: May we request at this time permission from the Court to withdraw certain exhibits at the conclusion of the hearing for purposes of briefing?

The Court: For purposes of briefing?

Mr. Resnik: Yes. We do not have other copies, those being filed.

The Court: You could make copies, could you not?

Mr. Resnik: We could if we could borrow them for the purpose of making copies.

Mr. Calhoun: I have no objection, if it is all right with the Court.

The Court: You may withdraw exhibits for the purpose of making photostatic copies, for briefing purposes.

(Testimony of Lawrence H. Goebel.)

Mr. Resnik: I ask the Clerk to mark these two exhibits for identification.

The Clerk: Respondent's Exhibit C for identification, California Individual Income Tax Return for the year 1950 of Elizabeth Vogel.

Respondent's Exhibit D for identification, California Individual Income Tax Return for the year 1950 for Les Vogel.

(Respondent's Exhibits C and D, respectively, were marked for identification.) [21]

Q. (By Mr. Resnik): I hand you, Mr. Vogel, two exhibits for identification, Respondent's C and D, being pencilled copies of California individual income tax returns of Elizabeth B. and Les Vogel for the year 1950, and ask you whether you can identify those documents as coming from your file.

A. Yes, those are——

Q. And on those returns you sought allocation on a community property basis, as you have done historically before?

A. Well, I presume so. I believe on these there is some difference as to the allocation of dividends. It's apparent from the returns here that it isn't on an equal basis, excepting the salary—let's see.

Q. Couldn't the fact of the allocation of dividends be accounted for by the date of death of the decedent as of 8/17/1950?

A. Well, we apparently haven't the detail here of what they were, so I couldn't know from looking at this. I would have to see the detail.

Q. (By Mr. Resnik): Did you assist in the

(Testimony of Lawrence H. Goebel.)

preparation of the federal and state tax return of the decedent Les Vogel? A. No, I didn't.

Mr. Resnik: I have no further questions.

Redirect Examination [22]

Q. (By Mr. Calhoun): Mr. Goebel, do you recall that for the year 1950 certain stocks, for instance Pacific Turf Club stock, some of it stood in his name, Mr. Vogel's name, and some of it stood in Mrs. Vogel's name? Do you recall that?

Mr. Resnik: I object to the question as leading and suggestive, your Honor, on its face.

Mr. Calhoun: Does this return show an itemization of anything at all?

Mr. Resnik: Which return?

Mr. Calhoun: The return that you had, the 1950 return.

Mr. Resnik: Here (indicating).

Q. (By Mr. Calhoun): Of the stocks owned by Mr. Vogel or Mrs. Vogel, or both of them, anyway, do you recall how the stocks stood in 1950, in what names, any of them?

A. Well, I am sure that there is a detail supporting these figures here, where I could show that certain dividends were shown separately as to Mr. and Mrs. Vogel and I know that that detail, I believe I could get the detail supporting that, showing segregation.

Q. You say, you can get that?

A. Well, yes, I believe so. I believe that information is available. [23]

(Testimony of Lawrence H. Goebel.)

Q. Do you think you could have it here this afternoon? A. I believe so.

Mr. Calhoun: May we have this marked for identification?

The Court: Petitioner's Exhibit 3 for identification.

(Petitioner's Exhibit 3 was marked for identification.)

Q. (By Mr. Calhoun): I hand you an accounting sheet, it purports to be, it says "Les Vogel and Elizabeth Vogel" at the top, which has been marked Petitioner's Exhibit 3 for identification purposes. Have you ever seen this before?

A. Yes. I prepared it.

Q. What is it?

A. Well, it shows the segregation of their personal incomes for the year 1950 and it shows a segregation of the dividends for the purposes of preparing this state return.

Q. You say "state return"?

A. Yes, California individual income tax returns.

Q. Is that the breakdown that you were talking about?

A. Yes, it is. That shows the 83 hundred as being——

Q. Can you explain the segregation to the Court?

A. Well, I discussed with the attorneys the allocation of these various dividends and this was the basis that they advised me it should be divided. [24]

(Testimony of Lawrence H. Goebel.)

Mr. Calhoun: I would like to have this marked as the exhibit next in order for identification.

The Clerk: Petitioner's Exhibit 4 for identification.

(Petitioner's Exhibit No. 4 was marked for identification.)

Q. (By Mr. Calhoun): I hand you what has been marked Petitioner's Exhibit 4 for identification. Have you seen that before? A. Yes.

Q. What is it?

A. These are worksheets supporting the preparation of the 1950 income tax returns and it gives the detail of dividends that were those of Les Vogel and it gives the detail of dividends assigned to Elizabeth Vogel, in the amount of \$16,600——

Q. Is that——?

A. (Continuing): Les Vogel, Jr.

Q. And this, a continuation of the same?

A. Yes.

The Court: Speak louder so I can hear you.

A. (Continuing): Those were dividends received after a certain date, that were included in the fiduciary return of Les Vogel, deceased.

Q. (By Mr. Calhoun): (Indicating.)

A. Well, these are various details of dividends of [25] Dorothea Vogel and just supporting data.

This \$16,600 was divided into two amounts, \$8,300 going on the return of Les Vogel, Sr., and \$8,300 plus this figure of \$17,276.60, the figure that went on the return of Elizabeth Vogel, in the amount of \$25,576.60.

(Testimony of Lawrence H. Goebel.)

Q. In the 1950 State of California tax return did you not segregate the dividends of Mrs. Vogel and those in the name of Les Vogel? A. Yes.

Mr. Resnik: I object, your Honor. That calls for a conclusion of what was done, a fact for the Court to determine.

The Court: Does the answer to this appear in the document that he has?

Mr. Calhoun: It shows they are separately stated, Your Honor. In other words, the detail shows the——

The Court: You may answer.

What was the question?

(Last question and answer read.)

A. Yes, I did.

Recross Examination

Q. (By Mr. Resnik): On what basis did you split the dividends that were computed for Les Vogel of \$16,600 and allocate \$8,300 to his return and then allocate the other \$8,300 to Mrs. Vogel's [26] return?

A. Well, it was on the basis that, apparently that those standing in his name were community.

Q. What about the stock standing in her name?

A. Well, it was presumed to be her separate property.

Q. By whom was it presumed?

A. I discussed this with the attorneys at the time, this particular attorney.

Q. Who were the attorneys?

(Testimony of Lawrence H. Goebel.)

A. Well, there was Mr. Skinner, the company attorney, and Mr. Partridge and Mr. O'Connell—I believe that is the name, O'Connell.

Q. Didn't you historically divide the dividends between the respective parties for prior years?

A. In past returns, it is apparently obvious that that was done.

Q. This was the first time that this system was adopted?

A. To the best of my recollection——

Q. In 1950?

A. To the best of my recollection, I believe it was, excepting on the dividends from the Les Vogel Chevrolet Company. They were always divided equally between the two, because they were from the separate stocks of each.

Q. Then, on the 1950 return, didn't you have \$15,000 of dividends from Les Vogel Chevrolet ascribable to Mr. Vogel? [27]

A. Let's see. On the '50 return?

Q. Yes.

A. Apparently so, but those were paid, I believe they were paid prior to his death.

Q. But didn't you divide—did you divide that amount of 15 thousand, one-half to Les Vogel and one-half to Mrs. Vogel?

A. That appears to be the case—of 15 thousand——

Q. Isn't that inconsistent with what you just previously said, that you split the dividends?

Mr. Calhoun: I object.

(Testimony of Lawrence H. Goebel.)

The Court: Objection sustained.

Q. (By Mr. Resnik): Didn't you in prior years ascribe the dividends from Les Vogel Chevrolet stock one-half to each?

A. Well, they each owned equal shares and the dividends from those shares were reported in their—were separate returns, were made and reported in their separate returns.

Q. Weren't separate returns made for 1950, Exhibits C and D for identification?

A. For 1950, yes, they were.

Q. Didn't you in those returns make an allocation of one-fourth and three-fourths, for the first time?

A. Well, the detail shows right here how it was divided.

Q. I am asking you what you did. Will you please answer [28] the question?

A. I don't recall any one-fourth or three-fourths. I included the dividends, the 15 thousand, it shows right here on the worksheet, which apparently were paid prior to his death to Les Vogel, and the 15 thousand on the stock in the name of Elizabeth Vogel were shown as going to her, on the schedule here.

Q. On the 1950 return of Les Vogel—

A. Here is his return here (indicating).

Q. Yes. A. Les Vogel, deceased.

Q. Exhibit D for identification, you show dividends of only \$8,300. A. Yes.

Q. Whereas you have just testified that Mr.

(Testimony of Lawrence H. Goebel.)

Vogel prior to his death received at least \$15,000 of dividends from the Vogel Chevrolet Company.

A. That is correct.

Q. How do you reconcile the reporting of \$8,300 of dividends for Les Vogel on his return, Exhibit D, when you have just testified that he received not less than \$15,000 from one source alone?

A. The 15 thousand was from the Les Vogel Chevrolet Company. There were other small dividends bringing the total up to \$16,600, \$8,300 of which went on the return of Les Vogel and \$8,300 was put on the return of Elizabeth Vogel. [29]

Q. Didn't you say that in prior years the dividends that came to Les Vogel because of the shares of stock that stood in his name were reported by him, that the dividends on the Les Vogel Chevrolet stock, owned by Mr. Vogel and Mrs. Vogel were split down the middle? Isn't that what you testified to?

A. Well, they each got dividends equivalent to the shares of stock owned, whichever way you want to put it.

Q. How was that reported?

A. Half was put in his return from his share and half was put in her return.

Q. But in 1950 you didn't do that, did you?

A. No, we didn't.

Q. Do you have any explanation of what happened, to make a change?

A. Well, that was done, as I said before, on the advice of the attorneys.

(Testimony of Lawrence H. Goebel.)

Q. Did you discuss with the attorneys the handling of the tax matters for prior years?

A. No. I don't remember specifically discussing tax matters with the attorneys in prior years. Probably it was brought about by the death of Les Vogel.

Q. Did you discuss with Mrs. Vogel the filing of the 1950 return?

A. I don't recall. I don't think there was—I really [30] don't recall.

Q. Did you discuss with her the filing of any of her returns for prior years?

A. Probably very briefly. I don't recall. Most of my discussion was with Les Vogel, Sr., and the office manager employed at the particular time with the Les Vogel Chevrolet Company.

Mr. Resnik: I have no further questions at this time, your Honor.

Further Redirect Examination

Q. (By Mr. Calhoun): Mr. Resnik questioned you with regard to splitting some of the income. Isn't it true that from the period 1943 through the partnership, which was terminated October 31, 1946, that you prepared partnership returns?

A. Yes.

Q. For that partnership?

A. Yes, I prepared them from the partnership books.

Q. And the individual income tax returns you prepared took the income that should be allocated

(Testimony of Lawrence H. Goebel.)

to each one of the individuals from the partnership returns, is that not true?

Mr. Resnik: The best evidence would be the returns themselves or, secondly, the books and records of the partnership. I object.

The Court: You may answer. [31]

A. The partnership returns, as I recall, showed the distributed shares, one-third to Les Vogel, one-third to Elizabeth Vogel and one-third to Les Vogel, Jr., and those amounts, as I recall, were carried into the individual returns on that basis.

Q. (By Mr. Calhoun): And those amounts would necessarily be even, would they not, with the one-third interest?

Mr. Resnik: I object. I submit again, the best evidence would be the books and records of the organization.

The Court: I sustain the objection to that question.

Mr. Calhoun: I have no further questions.

The Court: You are excused.

(Witness excused.)

Mr. Calhoun: I would like to offer in evidence the exhibits marked for identification as Nos. 3 and 4.

The Court: They may be received in evidence as Exhibits 3 and 4.

(Petitioner's Exhibits Nos. 3 and 4 were received in evidence.)

Mr. Calhoun: I believe these were together.

The Clerk: They were both together, yes.

Mr. Calhoun: I would like to offer these returns.

The Court: What are they?

Mr. Calhoun: These are the California individual income tax returns for the year 1950. They have been marked [32] Respondent's Exhibits C and D for identification. I would like to offer them in evidence.

The Court: They will be received.

The Clerk: Shall I make that a Petitioner's exhibit, your Honor?

The Court: Do you want to make this a joint exhibit, Mr. Resnik?

Mr. Resnik: Yes, they can be joint exhibits, your Honor, the returns.

The Clerk: That will be C-5 and D-6.

(Respondent's Exhibits Nos. C and D, previously marked for identification, were received in evidence as Respondent-Petitioner's Exhibits C-5 and D-6.)

Mr. Calhoun: I would like to call Mr. Les Vogel, Jr.

J. LESLIE VOGEL, JR.

was called as a witness on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: J. Leslie Vogel, Jr.

Direct Examination

Q. (By Mr. Calhoun): Mr. Vogel, you recall your father's Chevrolet business, I assume, as long

(Testimony of J. Leslie Vogel, Jr.)

as you can remember? A. Yes, sir. [33]

Q. Do you recall when you first went into the business? A. 1938.

Q. When you first went into the business?

A. Yes.

Q. What did you do at that time?

A. I attended first a school for dealers' sons conducted by Chevrolet Motor Company and upon my return I joined the sales force.

Q. When did you first acquire an interest in the business and how was that acquired?

A. Well, I started buying into the business when it became a partnership in 1943.

Q. What did you do then?

A. Well, I was in the Army then, but in discussions with my father it was decided that he would, and my mother would, sell me a part of their interest, so that I would become a third-owner of the business.

Q. And do you recall when a partnership was set up?

A. Well, when the partnership was set up I was in the Army, in Italy.

Q. And there was a limited partnership agreement, was there not? A. Yes, sir.

Q. Effective as of January 1, 1943?

Mr. Resnik: I object. The questions are leading, [34] your Honor.

Mr. Calhoun: We have stipulated to it.

Mr. Resnik: Well, if the matters are stipulated, I object to their being repeated.

(Testimony of J. Leslie Vogel, Jr.)

Mr. Calhoun: I just want to refresh his memory.

The Court: Proceed.

A. To the best of my recollection, it was '43.

Q. (By Mr. Calhoun): What was your interest in the business?

A. Well, I was privileged to be able to buy the third interest in the business out of earnings.

Q. How did you buy that, what did you do, to evidence that you owed the money for a third interest in the business?

A. I signed a note for it.

Q. You signed a note for it? A. Yes.

Q. To whom?

A. One to my father and one to my mother.

Q. Did you have separate notes?

A. I can't answer that.

Q. When you came back from the service—well, do you recall when you came back?

A. July 27, 1945.

Q. And you then became active in the business, is that true? [35] A. Immediately.

Q. What did you do, in your active participation in the business?

A. Well, I became a—I was a paid-up third owner of the business without having had to contribute any service, because it happened during the war that the obligation had been satisfied. I came back, we didn't have new automobiles until November of '45 and they weren't being sold until approximately May of 1946, so I was able to work

(Testimony of J. Leslie Vogel, Jr.)

in different departments of the business, in selling used cars and just general management of the business, learning the management aspect before——

Q. You actively participated in the business itself? A. Yes.

Q. And you became a general partner, did you not? A. In 1945.

Q. Then, do you remember when the partnership was dissolved?

A. I don't recall the date.

Q. Do you remember when the new corporation was formed, what year? A. 1946.

Q. And when the new corporation was formed what was your stock ownership?

A. One-third.

Q. And what was your father's stock ownership?

A. One-third.

Q. What was your mother's stock ownership?

A. One-third.

Q. And was this stock actually issued in their names? A. Yes.

Q. Individually? A. Yes.

Q. Were you familiar with your father's and your mother's brokerage business?

A. Somewhat.

Q. Do you recall that your father established a brokerage account with Dean Witter in 1946?

Mr. Resnik: I object; the question is leading.

Mr. Calhoun: It is stipulated, your Honor.

The Court: Very well.

Mr. Calhoun: I am just referring to it.

(Testimony of J. Leslie Vogel, Jr.)

The Court: Proceed.

Q. (By Mr. Calhoun): Do you recall that your mother established a brokerage account at Dean Witter's in 1948? A. Is that a fact?

Q. It's been stipulated. Do you recall it? I am asking you——

A. Well, I know that the three of us did business with Dean Witter Company. [37]

Q. Did you have you own account there?

A. Yes, sir.

Mr. Calhoun: For the moment I am going to change the subject and discuss the family allowance. I am just wondering whether your Honor would rather have Mr. Vogel, Jr., cross-examined on the points that I have brought out or rather have me present it all on the family allowance now. I don't like to have them confused.

The Court: Do you have any particular preference?

Mr. Resnik: I have no particular preference, your Honor.

The Court: Go ahead.

Q. (By Mr. Calhoun): Do you recall the date of your father's death? A. August 16, 1950.

Q. Where were you living then?

A. With my mother and father and sister.

Q. Where was that?

A. 369 Marina Boulevard.

Q. What type of a house is that?

A. A very nice home.

Q. What kind of a house?

(Testimony of J. Leslie Vogel, Jr.)

A. Three-story detached dwelling.

Q. Did you have any servants?

A. Yes, sir. [38]

Q. What did you have?

A. We had a housekeeper.

Q. Were you familiar with the family expenses to run the home?

A. To the extent that neither my sister nor myself ever contributed anything to it.

Q. In other words, you were just a——

A. We were guests.

Q. A sort of a guest at your own home?

A. Yes.

Q. Did your mother entertain much, do you recall? A. An average amount, regularly.

The Court: What is an average amount?

The Witness: I would say at least once a month, having guests in.

Q. (By Mr. Calhoun): The home was paid for, was it not? A. To the best of my knowledge.

Q. Have you any idea what the taxes were on that home? A. I couldn't answer that.

Q. Are you familiar at all with the grocery bills or anything of that nature? A. No, sir.

Q. What section of town, how would you describe the section of town where that home was?

A. Above average income. [39]

Q. Above-average income?

A. Yes. I would say a wealthy neighborhood.

Q. And you have lived at your home for how long at that place?

(Testimony of J. Leslie Vogel, Jr.)

A. We went there in 1941.

Q. If your mother received a family allowance of \$1,500 a month, do you think you would be in a position to say whether or not that was a reasonable sum for that period to run the home and everything, feed you all, pay the bills and her own living expenses?

A. Well, that was determined by, as having been less than my father's salary.

Q. What was your father's salary at that time?

A. As I recall, it was \$1,800 a month.

Q. Of course, he had dividends besides that?

A. Well, that is from investments. That was his salary.

Q. His salary was about \$1,800 a month?

A. Yes.

Q. Did most of his salary go into maintaining the home, if you know?

Mr. Resnik: I object, your Honor.

Mr. Calhoun: I asked him if he knew. If he knows, he may answer it, may he not, your Honor?

The Court: If he knows, he may answer.

Do you know?

The Witness: What was the question? [40]

(Last question read.)

A. I would say yes.

Mr. Calhoun: I have no further questions.

Cross Examination

Q. (By Mr. Resnik): What is your age, Mr. Vogel?

A. Thirty-seven.

(Testimony of J. Leslie Vogel, Jr.)

Q. Was your sister over 21 in 1950?

A. Yes.

Q. At the time, hadn't she been married at that time? A. She has never married.

Q. She was over 21 at that time? A. Yes.

Q. And, as I understand it, there were four of you, four members of the family in the household, together with one servant? A. Yes.

Q. Prior to your father's death? A. Yes.

Q. And after your father's death you, your sister and your mother continued to occupy the house?

A. Together with a servant.

Q. Together with a servant. And you made no contribution before your father's death to the makings of the home? A. No, sir. [41]

Q. And you made none after? A. No, sir.

Q. Your sister made none before?

A. Or after.

Q. You stated that you first took an active interest in the Vogel Chevrolet business sometime in 1938? A. Yes, sir.

Q. How old were you at that time?

A. I was born in 1919. I would have been 19 years old then.

Q. I think your arithmetic is correct.

As I gather it, your father was the dominant figure in the business at all times? A. Yes.

Q. Did he continue to be active in the business up until the time of his death? A. No, sir.

Q. You say, he did not? A. No, sir.

Q. When did his activity in the business cease?

(Testimony of J. Leslie Vogel, Jr.)

A. He was in a sanitarium from just prior to November—or it would be just prior to Thanksgiving, the year before his death. He had been home for 1 year. I would have to say he was home from the time of his discharge from the sanitarium. I don't know just exactly how long. [42]

Q. Did your mother take any active interest in the business? A. No, sir.

Q. When you bought into the business, actually during the period that the note or notes which you gave to purchase your interest in the business, you were away in the Army, were you not?

A. Yes, sir.

Q. And part of the earnings were attributed to you and then were used to discharge the note, or the obligation you had to your parents?

A. That is right.

Q. With whom did you discuss the arrangement as to your acquiring an interest in the business in 1942?

A. We have always been a very closely knit family and to say it was discussed at the business or at home would be hard to say.

Q. With whom did you discuss it?

A. With my mother and father.

Mr. Resnik: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Calhoun): Did you discuss with your mother and father any plan for the business?

(Testimony of J. Leslie Vogel, Jr.)

A. What did you say? What does that——?

Q. For the disposition of the business?

A. Disposition of the business?

Q. Yes. In case of death or anything like that, did you ever discuss it?

A. Well, it was always hoped that it would be a continuing business. A Chevrolet franchise was only issued for one year, and they have what they term "Paragraph Third" of the selling agreement, wherein my father was the—they will only do business with one individual, be it a partnership or a corporation, their contract is only with one person, and it wasn't until 1939, it wasn't—I can't give you the date, but it was just prior to my father's passing that I was named on the contract, I think it was about two years before he passed away.

Q. Did you ever discuss with your father why the stock would be issued one-third each to you and your mother and your father?

A. Well, he told me that——

Mr. Resnik: I object, your Honor. The answer is obviously hearsay as to the Government in this proceeding if they are seeking to introduce it to prove the truth of the statements made by the decedent at this time.

Mr. Calhoun: I just asked him if he had ever discussed it.

Mr. Resnik: That can be answered yes or no.

A. We did discuss it.

Q. (By Mr. Calhoun): What did you discuss?

A. The——

(Testimony of J. Leslie Vogel, Jr.)

Q. As to what extent did you discuss it?

A. The terms of his will were designed to provide for my sister, he having figured that during his lifetime he had provided for me and my mother.

Mr. Resnik: I move that the answer be stricken as being hearsay.

The Court: The answer may stand.

Is there anything further?

Mr. Calhoun: There is one item I wanted to bring up with this witness which I just thought of now.

Further Direct Examination

Q. (By Mr. Calhoun): On the 2nd page of the 90-day letter——

Mr. Calhoun: Which, I assume, is already in the pleadings—is that not right, your Honor, or need it be introduced? A copy of it, I think, is supposed to be——

The Court: There is a copy attached.

The Clerk: It seems to be a photostatic copy of the 90-day letter and the statement attached to it.

Q. (By Mr. Calhoun): On page 2 there are certain stocks listed under [45] Schedule F (b). Can you identify what stocks were your mother's and which stocks on page 5 of the 90-day letter were your father's?

Mr. Resnik: I object, your Honor.

Q. (By Mr. Calhoun): If you know.

Mr. Resnik: The answer calls for a conclusion and opinion of the witness. He has not been quali-

(Testimony of J. Leslie Vogel, Jr.)

fied in that regard. Furthermore, if he is asked to answer as to the names in which the stock certificates were held, the best evidence of that would be the certificates themselves and not the testimony of a party whose name did not even appear on the certificates.

The Court: To what are you asking him to refer?

Mr. Calhoun: I am referring to those particular paragraphs of the 90-day letter. There are stocks listed there and I am asking him if he knows which ones were in the name of his mother.

The Court: He may answer.

A. I have sitting with my mother some records of my father's stock transactions and I know that from this one, under Item 3 of the Olympic Club privilege, that would belong to my father;

That items 1, 2 and 3 belonged to my father;

The four Pacific Turf Club stocks belonged to my [46] mother, and there were four shares that stood in my father's name;

My father did not own any PG&E redeemable first preferred, or any Bank of America or any PG&E common or any stock in the Leslie Financing Company;

And that the Anse Vista Apartment House property is my mother's.

Q. (By Mr. Calhoun): Do you recall how that Anse Vista property was acquired?

Mr. Resnik: If you know.

Mr. Calhoun: I am asking him if he recalls.

(Testimony of J. Leslie Vogel, Jr.)

A. My mother purchased it from a contractor in San Francisco by the name of Arthur Hardy.

Q. (By Mr. Calhoun): Do you know what funds were used, if you know, to purchase this property?

A. I presume they were her own funds.

Mr. Resnik: I move that that be stricken.

The Court: It may be stricken.

Mrs. J. Leslie Vogel, Sr.: Well, it is my money.

The Court: Just a moment. You are not on the witness stand and you will remain silent.

Q. (By Mr. Calhoun): What records do you have in regard to the brokerage [47] transactions?

A. He carried all of those transactions from 1949, he purchased——

Mr. Resnik (interrupting): You were asked what records he had. Will you please answer that question?

The Witness: I have the statements from the brokerage companies.

Q. (By Mr. Calhoun): Can you identify any of these stocks listed on the 90-day letter and the return through these statements?

A. Where is that?

This doesn't give the amounts of shares, but Item 1 is Transamerica Corporation.

The Court: Item 1 of what?

The Witness: Page 5.

Mr. Calhoun: Page 5, Subparagraph (g).

The Court: Of what?

Mr. Calhoun: The 90-day letter.

A. (Continuing) Here is a statement dated De-

(Testimony of J. Leslie Vogel, Jr.)

ember 30, 1949, from Dean Witter & Company, showing that he had two hundred shares of Greyhound Corporation—100 shares of Greyhound—

Mr. Resnik: If your Honor please, I submit that this examination is improper. The witness is seeking to refresh his recollection on matters of which he has no present [49] knowledge from memoranda that were not prepared by him, on matters that were not in his custody.

Mr. Calhoun: I think the objection is probably well taken, your Honor, and this noon I would like to go over these with him, and recall the witness later on, to go over that phase of the examination, to go over these matters. I think, as your Honor knows, when this case first came up, that I was called into the case last week, the attorney of record is now in Washington, D. C., and I have been working night and day to get all the facts and to assemble them in the proper order so that I can present it the best I can to your Honor.

The Court: You may do that.

Mr. Calhoun: Thank you.

That is all I have right now.

Do you have any questions?

Mr. Resnik: Yes.

Cross Examination

Q. (By Mr. Resnik): Do you know where your father obtained the funds with which to acquire any of the stock that stood in his name?

(Testimony of J. Leslie Vogel, Jr.)

A. From his interest in the partnership and its ultimate dissolution. There was an overage that allowed for investments and that is when he started investing the most in the market.

Q. Upon the dissolution of the partnership, wasn't there [50] actually a shortage and didn't all of you have to put in more money, into the corporation that was started, that was restarted in 1946?

A. Well, the amount of money that was put into the corporation was \$50,000 apiece. I do not recall the amount of money that was necessary to be put in, but the partnership did make money and we all had money from the partnership earnings. It was never a problem to purchase stocks or establish the corporation. It was——

Q. Did you draw the money out of the corporation or did it remain as a liability of the corporation to you?

A. At what time?

Q. At the time of its formation and immediately thereafter.

Mr. Calhoun: That is stipulated.

A. Well, it was a partnership.

Mr. Calhoun: It is stipulated, your Honor, as to what happened.

Mr. Resnik: If your Honor please, the apparent testimony of the witness is contrary to the stipulation. He has testified that there was money available at the time of the dissolution of the partnership, whereas in fact it appears that it was neces-

(Testimony of J. Leslie Vogel, Jr.)

sary that additional resources be placed in the corporation at that time.

Mr. Calhoun: No, it isn't. That is a conclusion [51] that is not warranted by the evidence, the stipulation or anything else.

The Court: Where do you find that in the stipulation?

Mr. Resnik: I am referring now, your Honor, to page 3 of the stipulation, paragraphs 9, 10 and 11.

The Court: What is the question which you are objecting to?

Mr. Calhoun: I am saying that this has been stipulated to, that, first, when the partnership closed December 31, 1942, at midnight, the accounts payable—where it says "Accounts Payable", that is actually the drawing account or the account of the partners with the business, and it says "Partners' Capital", under that \$32,709.22 for Les Vogel, and the same, with two cents' difference, for the other two. And then they formed a new corporation and they wanted to make the capital stock \$150,000, so it is stipulated below, "In order to provide the \$50,000 payment by such partner for the stock issued, the amounts necessary to bring the partnership capital accounts up to \$50,000 were taken from the accounts payable account."

The Court: "Such" has been changed to "each" in this copy.

Mr. Resnik: That is correct, each.

Mr. Calhoun: Yes; it hasn't been corrected in

(Testimony of J. Leslie Vogel, Jr.)

this copy. Let me get my yellow copy. "In order to provide the [52] \$50,000 payment by each partner for the stock issued, the amounts necessary to bring the partnership capital accounts up to \$50,000 were taken from the accounts payable account."

In other words, the company owed them as an account payable this money above and all they did was to take the capital account and took that difference, increased the capital to \$50,000 each. Now, that doesn't mean that they didn't have money or did have money. Counsel is making an inference there that isn't warranted by the evidence or anything else, and so stating it.

Mr. Resnik: I am seeking to avoid making any inferences. I asked the question of the witness and Mr. Calhoun says it is stipulated.

The Court: What was the question?

Mr. Resnik: I asked the witness if there actually wasn't a shortage at the time of incorporation and didn't all the partners, former partners, have to put more money into the corporation that was restarted in 1946. The witness stated they put in \$50,000 apiece. I asked him if the money was drawn out of the corporation or if it remained as a liability of the corporation to them, at the time of the formation and immediately thereafter.

Mr. Calhoun: Well, they transferred the accounts payable, which was actually a share of the profits which had not been transferred to the stated capital, so the capital [53] account, and he says was it necessary to do it. Well, it says here, "In order

(Testimony of J. Leslie Vogel, Jr.)

to provide the \$50,000 payment by each partner for the stock issued, the amounts necessary to bring the partnership capital accounts up to \$50,000 were taken from the accounts payable account." So it is stipulated to.

The Court: I think the stipulation closes the point.

Q. (By Mr. Resnik): You gave some testimony, Mr. Vogel, with reference to the Anse Vista Apartment property, which, I believe you testified, was in the name of your mother. A. Yes, sir.

Q. Do you know where she obtained the funds to acquire that?

A. From the Les Vogel Chevrolet Company, the earnings of the Les Vogel Chevrolet Company.

Q. Do you recall attending a meeting in the office of Mr. Jacobs years ago at which Mr. Kubik was present—Mr. Kubik, who is sitting at my right?

A. Yes, sir.

Q. Do you recall that at that time your mother was present? A. Yes.

Q. Do you recall that at that time Mr. Kubik asked certain questions of your mother?

A. Yes. [54]

Q. He asked her with reference to the Anse Vista Apartment property, did he not?

A. Yes.

Q. Didn't she reply at that time, "That was always Daddy's," referring to your late father?

A. What "was always Daddy's"?

Q. The Anse Vista Apartment property.

(Testimony of J. Leslie Vogel, Jr.)

A. I wouldn't answer to what was said then.
If Mr. Kubik——

Q. Do you recall such a statement being made by her? A. If it was made, it was wrong.

Q. Do you recall such statement being made?

A. No, I don't.

Q. Do you recall that after that statement was made you said to your mother, "Keep quiet. You're talking too much"? A. No, sir.

Q. Do you know the time, dates, when the stock that you say was in your mother's name was acquired? A. The dates that——?

Q. Yes. A. I can find it out.

Q. Do you know? A. No.

Q. Do you know who placed the orders for those specific shares of stock? [55] A. She did.

Q. How do you know she placed the orders?

A. Because she was in the office when Bob Fredericks called my dad and told him that there was on offering of the first preferred PG&E coming on the market.

Q. I didn't ask you about first preferred PG&E. I asked you about all the stock.

A. I am making a specific reference to a stock that I know of——

Mr. Calhoun: I object to the form of the question. Generally, all the stock, that covers over a long period of time. It's like saying every day you ride down in the streetcar or something. Maybe you don't some days. It is too broad to suit me.

Mr. Resnik: That was precisely the form of my

(Testimony of J. Leslie Vogel, Jr.)

objection, if your Honor please, when this witness testified that he knew that certain stock stood in the name of his mother or belonged to his mother, in the most general terms possible. I am pursuing that same line of inquiry, since your Honor overruled my objection at that time, to test this witness' knowledge of those facts.

The Court: Proceed.

Read the question.

Mr. Resnik: It may be more convenient if I pursue another question at this time, although he did interrupt the [56] witness.

Q. (By Mr. Resnik): Do you know who placed the order for the Pacific Club stock?

A. Yes, sir.

Q. Who placed that order? A. I did.

Q. How many shares did you order at that time?

A. Whatever was available.

Q. In whose names did you purchase that stock?

A. My name, my mother's name and my father's name.

Q. When was that order placed?

A. I can't give you the date.

Q. With whom was it placed?

A. Various brokers, in an endeavor to acquire four shares each, because there was a distinct advantage in having four shares of the stock.

Q. Do you know who placed the order for the Leslie Financing Company stock?

A. We formed the company, my mother, sister and I, at the suggestion of my father.

(Testimony of J. Leslie Vogel, Jr.)

Q. When was the company formed?

A. '48 or '49.

Q. What was the nature of its business?

A. To finance what we called "prime paper".

Q. Who were its officers?

A. I was the president, my mother was named vice president, B. G. Skinner as secretary, and James Doyle as treasurer.

Q. What service did your mother render to the company? A. None. She financed it partly.

Q. What was the initial capital of the company?

A. Thirty thousand dollars; ten thousand each.

Q. Where did your sister obtain her funds to make her investment? A. I do not know.

Q. Where did your mother obtain her funds to make her investment, if you know?

A. Previous investments.

Q. But you don't know where your sister got her money? A. No, sir.

Q. Did she have previous investments?

A. I do not know.

Q. You weren't familiar with what your sister was doing?

A. I don't know whether my father or mother gave her any money during his lifetime.

Q. Who placed the order for the Pacific Gas & Electric common stock? A. I do not know.

Q. When was it ordered?

A. I don't know.

Q. Who placed the order for the Bank of America stock? [58] A. I don't know.

(Testimony of J. Leslie Vogel, Jr.)

Q. When was it ordered?

A. I don't know.

Q. Do you know what salary your father drew from the corporation, beginning in 1946 until his death?

A. Well, I looked that up yesterday and in 1948—the other records are at the office, but the ready, available ones were January 1948, he was drawing \$1,500 a month, and in February it was raised to \$1,800 a month until he passed away.

Q. In addition, didn't he get substantial bonuses also?

A. Yes, sir.

Q. So that his salary in each of the years was in excess of \$30,000, salary and bonus was in excess of \$30,000?

A. I believe he received 50 per cent of his salary as bonus.

Mr. Resnik: I have no further questions at this time.

The Court: Do you have any further questions, Mr. Calhoun?

Redirect Examination

Q. (By Mr. Calhoun): Has your mother had much business experience, do you know?

A. I would say none.

Q. She took no part at all in management of the Les [59] Vogel Chevrolet? A. No, sir.

Q. There are certain bank accounts stipulated to——

Mr. Resnik (interrupting): If your Honor

(Testimony of J. Leslie Vogel, Jr.)

please, I believe this is going beyond the scope of cross-examination, what would properly be redirect examination.

Mr. Calhoun: I agree, it is not proper redirect, but I had the thought of it right now, I believe he is the best one to identify it.

The Court: You may ask him.

Q. (By Mr. Calhoun): There were certain bank accounts in the Marina Bank, there was an account, savings account, No. 3139 in the Bank of America, Marina Branch, in the name of Elizabeth Vogel. Were you familiar with that savings account?

A. I knew that she had an account in that bank.

Q. There was also a savings account, No. 1421, in the Polk-Van Ness Branch of the B of A, in the name of Les or Elizabeth L. Were you familiar with that account at all?

A. I knew my father had an account there.

Q. There was an account in the name of J. Les or Elizabeth Vogel, a savings account, at Branch 253 of the Bank of America, Account No. 4214. Do you know what branch 253 was?

A. 253 was Twentieth and Irving.

Q. Is there such a bank there now? [60]

A. It's now 21st and Irving.

Q. And——

A. That is in the Sunset District.

Q. In the Sunset? A. Yes.

Q. They moved, is that it? A. Yes.

Q. There was a checking account in the Marina Branch of the Bank of America in the name of Les

(Testimony of J. Leslie Vogel, Jr.)

or Elizabeth Vogel. Are you familiar with that account?

A. I know that that was my mother's account.

Q. Did your mother write checks?

A. Yes.

Mr. Calhoun: I have no further questions.

Mr. Resnik: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Calhoun: Mrs. Vogel, please.

ELIZABETH S. VOGEL

a witness called by and on behalf of the Petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Elizabeth Vogel.

Direct Examination

Q. (By Mr. Calhoun): You are the widow of Les Vogel, Sr., is that correct? A. Yes.

Q. Do you recall when your husband first entered into the Chevrolet business? A. Yes.

Q. That was in the thirties, was it not?

A. Yes.

Q. Was it true that business was kind of rough during that period? A. Yes.

Q. And do you recall in 1943, January of 1943, when you and your husband and your boy, Les, Junior, formed a limited partnership?

A. Yes, I do.

(Testimony of Elizabeth S. Vogel.)

Mr. Resnik: The question is leading and——

Mr. Calhoun: It has been stipulated to, your Honor.

Mr. Resnik: It is not stipulated to in those terms.

The Court: She may answer.

A. Yes, I do.

Q. (By Mr. Calhoun): Do you recall when the business was incorporated in November, the 1st of November 1946?

A. Yes. I don't know what year it was, but I remember, we had—— [62]

Q. And at that time you were issued \$50,000 worth of stock, isn't that true? A. Yes.

Q. And do you have that stock?

A. Down at the shop.

Q. It is down at the shop? A. Yes.

Q. Now, there are certain securities which apparently stand in your name, isn't that true?

A. Yes.

Q. Do you have those securities? A. Yes.

Q. Are they available? A. Yes.

The Court: Speak a little louder, please.

The Witness: Yes.

Mr. Calhoun: Just a moment, your Honor.

I have here—if I may take the time out rather than call these people—I have a letter dated June 13, 1957——

The Court: Are you speaking to the Court or to Mr. Resnik?

(Testimony of Elizabeth S. Vogel.)

Mr. Calhoun: I am speaking to the Court and counsel, if I may.

The Court: Speak a little louder.

Mr. Calhoun: I have a letter from the Pacific Gas & [63] Electric Company, dated June 13, 1957, addressed to Mrs. Elizabeth Sue M. Vogel. This letter shows the holdings and acquisition dates and so forth.

And I also have the same for the Bank of America.

Mr. Resnik: This covers matters that are not before us at all.

Mr. Calhoun: Well, it covers all their transactions, if you go back.

Mr. Resnik: You had better strike out those that aren't here involved, because they would just be misleading.

Mr. Calhoun: Obviously anything after the date of death would not be relevant, but it's a complete transcript.

Mr. Resnik: If your Honor please, there has been submitted to us for the first time correspondence from Pacific Gas & Electric Company and correspondence from Bank of America, showing certificate numbers, dates of acquisition and names in which certain securities were held. To the extent that the letters show the certificates, dates of acquisition and names of those securities prior to the date of death of the decedent in August of 1950, we would have no objection to having the Court receive the information. We think that it would

(Testimony of Elizabeth S. Vogel.)

be misleading to have the matters before the Court relating to transactions after death because they are not involved in this proceeding at all. With that caveat and that explanation, we have no objection. [64]

The Court: What are you offering?

Mr. Calhoun: I am offering two letters. Rather than subpoenaing the PG&E people and the Bank of America people, I am offering letters in which they have given a transcript of the accounts——

The Court: Do you agree with Mr. Resnik's statement?

Mr. Calhoun: Yes, that is true, because some of these show after death and, of course, I have no control over the——

The Court: They will be received as Exhibit 7 for the Petitioner.

The Clerk: A letter dated June 13, 1957, from the Pacific Gas & Electric Company, Petitioner's Exhibit No. 7.

A letter dated June 13, 1957, from the Bank of America is admitted in evidence as Petitioner's Exhibit No. 8.

(Petitioner's Exhibits Nos. 7 and 8, respectively, were marked for identification and received in evidence.)

The Court: Proceed.

Mr. Calhoun: If your Honor please, this noon I am going over the items as to the stock accounts of Mrs. Vogel and Mr. Vogel. I don't have those ready to present to her at this time. I would like

(Testimony of Elizabeth S. Vogel.)

to take up out of order, break the continuity of it, the family allowance at this time, if I may.

The Court: Proceed. [65]

Q. (By Mr. Calhoun): Mrs. Vogel, you received certain checks from the estate of your husband for family allowance, did you not? A. Yes.

Mr. Calhoun: I have a petition for family allowance, a copy, Probate No. 118643, in the matter of the estate of J. Leslie Vogel, which has been filed.

The Court: And you want to offer it?

Mr. Calhoun: I want to offer this copy in evidence.

The Court: Any objection.

Mr. Resnik: No objection.

The Court: It will be marked Exhibit No. 9.

(Petitioner's Exhibit No. 9 was marked for identification, and was received in evidence.)

Mr. Calhoun: And I have also the order for family allowance in the same matter, in response to the petition.

The Clerk: Petitioner's Exhibit No. 10.

(Petitioner's Exhibit No. 10 was marked for identification and received in evidence.)

Q. (By Mr. Calhoun): On September 7, 1950, there was filed in the Probate of your husband's estate a petition, verified petition, verified by you, for a family allowance, in which it is stated that you were the surviving widow of J. Leslie Vogel, the decedent above-named, who died on the 16th day of August 1950, that said decedent left no minor children him surviving, that [66] the petition for the

(Testimony of Elizabeth S. Vogel.)

probate of the will of the said decedent is presently on file and the hearing of the same has not been had, that no inventory has been yet filed, that petitioner in the lifetime of her said husband was dependent upon him for her support and maintenance, and decedent did support and maintain petitioner during his lifetime and the estate of said decedent is amply able to provide a family allowance commensurate with the estate of said decedent and his station in life, and that the sum of \$1,500 per month is a reasonable amount for that purpose; and the Court entered an order granting the amount of \$1,500 per month to you.

Mr. Calhoun: I would like to have the checks made payable to Elizabeth Vogel from the estate of J. Leslie Vogel, covering the family allowance.

Mr. Resnik: We don't know that.

Mr. Calhoun: Covering the amount of \$1,500, \$3,000, \$4,500, \$4,500, and \$13,500, the first one being the one in the amount of \$13,500. I would like to have these marked for identification purposes.

The Clerk: Petitioner's Exhibit 11 for identification.

(Petitioner's Exhibit No. 11 was marked for identification.)

Mr. Resnik: If the Court please, may we have the number of checks noted, so we can make a record of it?

The Clerk: Five checks. [67]

Q. (By Mr. Calhoun): Mrs. Vogel, I hand you five checks, it says, "Pay to the order of Elizabeth

(Testimony of Elizabeth S. Vogel.)

S. Vogel," and they are signed by the estate of J. Leslie Vogel, and in varying amounts, and I ask you whether or not, whether these were or were not paid to you by the estate for family allowance, if you know.

A. This one, that doesn't say.

Q. That was cancelled. Is that your signature?

A. Yes, it is.

Q. Those were? A. Yes.

Q. Now——

A. Why wasn't this signed down here?

Q. They were paid to you, were they not? You endorsed this, and they went through the bank, is that correct? A. Yes.

Q. I will ask you if you feel that the sum of \$1,500 was a reasonable amount required to maintain your family and yourself in the status that you had been accustomed to prior to the decease of your husband. A. Yes.

Mr. Calhoun: I will offer these checks in evidence.

The Court: They will be received.

(Petitioner's Exhibit No. 11 was received in evidence.) [68]

Q. (By Mr. Calhoun): Where was your home located? A. 369 Marina Boulevard.

Q. How large a home was it?

A. Fourteen rooms.

Q. Fourteen rooms? A. Yes.

Q. And you required a maid? A. Yes.

Q. Full-time maid? A. Yes.

(Testimony of Elizabeth S. Vogel.)

Q. She lived there? A. Yes.

Q. And did you require gardeners?

A. Yes, we have a gardener. And caterers. We entertain quite a bit. Les said I entertained once a month. Well, he wasn't home too much at night.

Q. Did you entertain quite a bit?

A. Yes. After all, that is how we create our business. We have to entertain a lot. And in a social way, friends, too.

Mr. Calhoun: If your Honor please, I have this question of brokerage accounts I would like to straighten out this noon, and I have no further testimony in this regard from this witness, except I do want to go into the brokerage account with her.

The Court: We will recess until 2 o'clock.

(Whereupon, at 12:01 o'clock p.m., the hearing was recessed, to reconvene at 2:00 o'clock p.m. of the same day.) [69]

After Recess

(Whereupon, pursuant to the taking of the recess, the hearing was reconvened at 2:00 o'clock p.m.)

The Court: The witness will resume the stand.

Mr. Calhoun: If your Honor please, I have two witnesses, attorneys, I would like to put on out of turn.

The Court: Proceed.

Mr. Calhoun: Mr. Partridge.

ROBERT G. PARTRIDGE

a witness called by and on behalf of the Petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record?

The Witness: Robert G. Partridge.

Direct Examination

Q. (By Mr. Calhoun): Will you state your occupation, Mr. Partridge?

A. I am an attorney at law.

Q. How long have you been practicing law in California? A. Since 1926.

Q. Do you remember Les Vogel, the decedent in this case? A. Yes, I do.

Q. Did you ever represent him?

A. Yes, I did.

Q. For what period?

A. It's been a long while ago, but I would guess 15 [70] years. I don't mean guess, I would estimate 15 years.

Q. Did he have any other attorney that you know of? A. Yes, he did.

Q. What was his name?

A. Skinner—I am trying to think of his first name—Virgil Skinner.

Q. In what capacity did he represent him, Mr. Skinner?

Mr. Resnik: If you know.

Q. (By Mr. Calhoun): If you know.

A. To the best of my understanding, I repre-

(Testimony of Robert G. Partridge.)

sented Mr. Vogel personally, in personal affairs, and Mr. Skinner represented the Chevrolet agency conducted by Mr. Vogel and the members of his family.

Q. It has been stipulated that in November of 1946 the limited partnership consisting of Les Vogel and Les Vogel, Jr., as general partners, and Elizabeth Vogel as a limited partner, was dissolved and a corporation was formed. Did you have anything to do with the formation of the corporation that was then formed? A. Not that I recall.

The Court: May I inquire if that statement as to the limited partners is correct? It seems to me that the partnership was formed as of February 6, 1943, and named deceased as a general partner and his wife and son as limited [71] partners.

Mr. Calhoun: That is true, but later on, I believe the stipulation says it was changed; when the son came back from the war he became a general partner.

Isn't that correct?

Mr. Kubik: Yes.

Q. (By Mr. Calhoun): The decedent Les Vogel's will that was admitted to probate, was executed on December 13, 1946; did you prepare that will?

A. Mr. O'Connell and I did.

Q. Did you consult with Mr. Vogel?

A. I did.

Mr. Calhoun: Do you have a copy of that will?

Mr. Resnik: I haven't put it in evidence, no.

Mr. Calhoun: I have one.

Q. (By Mr. Calhoun): Do you have a file on

(Testimony of Robert G. Partridge.)

the will, an office file?

A. You are asking now for the first will, are you?

Q. For the first will.

Mr. Resnik: I thought you were asking for the will that was probated, the will of——

Mr. Calhoun: We call that the first will. I will explain that later on.

The Witness: There were two wills drawn. [72]

Q. (By Mr. Calhoun): This was the one that was signed and executed and probated.

A. No, I don't have an exact copy of it. I have a draft of it, with a number of changes interpolated. There is such a copy available in our office, but I don't have it with me—I beg your pardon, I do.

Q. You do have? A. Yes.

Q. When was the will executed?

A. December 13, 1946, according to the typewritten affixation. I believe that to be a copy of the will that was probated. Mr. O'Connell would be more familiar with that will than I am.

Mr. Calhoun: I would like to have this marked for identification.

(Petitioner's Exhibit No. 12 was marked for identification.)

Mr. Calhoun: I offer this in evidence.

The Court: Do you have any objection to this?

Mr. Resnik: No.

Mr. Calhoun: I will offer this in evidence, if your Honor please.

The Court: It will be received as Exhibit 12.

(Testimony of Robert G. Partridge.)

(Petitioner's Exhibit No. 12 was received in evidence.) [73]

Q. (By Mr. Calhoun): Handing you Exhibit 12, purporting to be the last will and testament of Leslie Vogel, executed December 13, 1946, is this the will which was drawn, executed, filed and probated?

A. Yes. To the best of my knowledge and belief, it is. I haven't a copy of the will probated on file. It is the only copy of the will, of a will we have in our file, except another one executed several years later—I beg your pardon—drawn several years later, but not executed.

Q. At the time that will was drawn did you discuss the provisions of the proposed will, that is, prior to the time it was drawn, did you discuss the provisions of the proposed will with Mr. Vogel?

A. Yes, sir.

Q. Did you take any notes at that time?

A. Yes, sir.

Q. Do you have any notes with you, such notes with you?

A. Yes. I have some notes here, some of which may pertain to the first will, some of which may pertain to the second will, and I am unable to tell you from looking at it which pertains to which. They could possibly be identified by various figures contained in them, or amounts, things of that sort, which might be tied into a time check as to the happening of events and how much the estate amounted to at such a time and what the status of the entity of the company [74] was at that time, but from the

(Testimony of Robert G. Partridge.)

notes themselves I can't accurately tell you whether they referred to the original will or the second one.

Mr. Calhoun: I would like to have this one marked separately.

The Court: Is this paper supposed to be of a will?

Mr. Calhoun: These are his original notes, drawn up at the time.

The Witness: You might say they were working notes that were given to me by Mr. Vogel at the time of our discussion.

The Clerk: Petitioner's Exhibit 13 for identification.

(Petitioner's Exhibit No. 13 was marked for identification.)

Q. (By Mr. Calhoun): Handing you what has been marked Petitioner's Exhibit 13 for identification, which states on the top of it, "Les Vogel Chevrolet Company, Les Vogel General Partner, Les Jr. Genl. Partner, Elizabeth Ltd. Partner," by that could you tell roughly what time those notes were taken?

A. I can't, except to tell you that they were taken at a time when the Chevrolet Company was so constituted as Mr. Vogel told me it was. You bear in mind that I said before that I had nothing to do with the entity of the Chevrolet [75] Company, whether it was a corporation or a partnership, so therefore I didn't enter into any of those changes or accomplishments, and I have no independent recollection as to when these dates were—

(Testimony of Robert G. Partridge.)

Q. Assuming that it has been stipulated that on November 1, 1946, the business was incorporated and the partnership balance sheet as of October 13, 1946, filed with the application for incorporation showed the following accounts, involving the partners, and they here list accounts payable and they also list partners' capital, Les Vogel \$32,709.22, Elizabeth Vogel \$32,709.20 and Les Vogel, Jr., \$32,709.20, and it is also stipulated that the opening balance sheet for the corporation as of November 1, 1946, showed the following: capital stock \$150,000, and it's also stipulated that the order to provide the \$50,000 payment by each partner for the stock issued, the amounts necessary to bring the partnership capital accounts up to \$50,000 were taken from the accounts payable, would that refresh your recollection as to any limiting dates of when those notes were taken?

A. May I ask a question? Do I understand that in that question you have incorporated the fact that on the date you mention, in November of 1946, the entity of the Chevrolet Company was converted to a corporation?

Q. That is correct.

A. Then, these were taken before that time. [76]

Q. They were taken before that time?

A. Yes.

Q. And they were taken in preparation for a will, is that correct? A. Yes, sir.

Q. And those are the only two wills that you drew at any time, drafted, for Mr. Vogel?

(Testimony of Robert G. Partridge.)

A. We have only mentioned one before, that one, and then we drew another one which we sent to him after further consultation with him, which was not executed, according to my knowledge.

Q. Which will was the one that these notes referred to? A. The first one.

Q. The one in evidence, is that correct?

A. Yes, sir.

Mr. Calhoun: I would like to offer this in evidence.

Mr. Resnik: May we take the witness on preliminary examination to find whether we have any objection to this?

The Court: Very well.

Examination On Voir Dire

Q. (By Mr. Resnik): I show you Petitioner's Exhibit 13 for identification and ask you whether that is in your handwriting.

A. Yes, all of it.

Q. All of it? [77] A. Yes.

Q. Does the words "Transmutation Agreement (January 1, '43)" appear in your handwriting?

A. Yes, sir.

Q. Was that incorporated at the time, at the same time?

A. Yes, sir. This was all, except for the identification mark of the Court, all written at substantially the same time, in the one interview.

Q. When was that interview held?

A. I can't answer that, sir, except to say that

(Testimony of Robert G. Partridge.)

it was prior to the date mentioned by counsel, on which the Chevrolet Company was apparently constituted a corporation. I can only say this from recollection, and it is not the best, that Mr. Vogel and I had been discussing a proposed will and estate for him for a number of weeks before we finally got down to drawing it, and I am not sure whether it was weeks or months, but I am sure that on that date he told me, as of that time, as of the time he was talking to me, the Les Vogel Chevrolet Company was a co-partnership.

Q. Do you have any other notes that were taken at or about the same time?

A. I have notes here that I am again unable to identify, as to whether they were taken in connection with the first will or the second will.

Q. You have handed me an additional sheet of paper, [78] written in pen and ink. Do you have any other notes? A. Yes, I do.

Mr. Resnik: If your Honor please, I am not going to pursue the line of inquiry any further, but I would interpose an objection to the receipt of only part of what appears to be a whole file of notes. I believe it would be misleading to the Court to receive only part of a whole packet of material that may have some evidentiary value, I fail to see the significance of this one sheet, but if it all came before the Court, then I would have no objection. To give the Court only part of it, I think, is clearly objectionable. On that basis, I would interpose an

(Testimony of Robert G. Partridge.)

objection to the receipt of Petitioner's Exhibit 13 for identification.

Mr. Calhoun: As far as the materiality of these notes are concerned, these are his original notes, "Les Vogel Chevrolet Company", he puts down one-third each, it is all in the handwriting of the witness, \$350,000 net value", "Transmutation agreement (January 1, '43)", which we think is very pertinent in this case, and that is the main purpose of these notes. There were some other items put down which I am not concerned with one way or the other, but this is the part which I have referred to in my opening statement, which I think is very important, and if counsel wants to know why we want it in, that is the reason.

Mr. Resnik: I should just like to direct the Court's [79] attention that there are many other notes of the same type, and only part of it is being offered to the Court. I would further say that an objection now would lie to the receipt of the exhibit if the Petitioner seeks to prove by the proffered exhibit that a transmutation agreement did exist. That would be hearsay as to us. These are merely the notes of Mr. Partridge and are not the evidence of the parties to such an agreement.

The Court: They might be corroborated. It will be admitted.

The Clerk: Petitioner's Exhibit 13.

(Petitioner's Exhibit No. 13 was received in evidence.)

Q. (By Mr. Calhoun): Handing you Petition-

(Testimony of Robert G. Partridge.)

er's Exhibit 13, which has been admitted in evidence, at the time you made those notes did you discuss with Mr. Les Vogel the status of his property? A. Yes, I did.

Q. What were your discussions?

A. Generally of what his property consisted, the interest of his wife in the properties, the business, the home, stocks and bonds, cash, life insurance, his interest in the same, and his son's, and how each would fare under the circumstances discussed, in the event of his death, I mean, or in the event of the death of any of them. [80]

Q. Did you ever have any understanding with him as to the status of the property, of the interest of the three partners in the partnership?

Mr. Resnik: I would object, your Honor. I believe that would be hearsay as to us, if the testimony is offered to prove the fact of the status.

The Court: The question is stated a little unfortunately.

Mr. Calhoun: I will put it this way:

Q. (By Mr. Calhoun): What caused you to write in your own handwriting on Exhibit 13 "Transmutation Agreement (January 1, '43)"?

A. I can only tell you this, Mr. Calhoun, any information I wrote down here was information given to me by Mr. Vogel. I had no independent information on this subject. Therefore, I can only conclude at this late date that the reason for the thing that caused me to write down that particular statement you asked about, "Transmutation Agree-

(Testimony of Robert G. Partridge.)

ment (January 1, '43)", was that Mr. Vogel told me of such an agreement having been executed that date.

Q. Do you know whether you had any discussion with him about such agreement being in writing or otherwise?

A. I couldn't answer that. I couldn't answer that. If I had an impression, I will call upon my recollection, again of many years back. My best recollection would be to [81] the effect that it was not in writing but had been accomplished through a series of transfers of some sort.

Q. Now, subsequent to the execution of that will in December of 1946, did you consult with Mr. Vogel, Sr., the decedent, pertaining to a new will?

A. Yes, sir.

Q. Do you recall when that was?

A. Sorry to be so awkward about this, but these papers are rather misplaced. My recollection is that it was sometime in 1950, I am not sure of that, and I don't find anything that verifies it in these papers.

Q. I will see if I can refresh your memory. It has been stipulated in this case——

A. May I interrupt you for just a moment? It might save some time.

Q. Yes.

A. Do you have further possession or would you ask Mr. O'Connell whether he has in his possession the proposed draft of the new will? I thought

(Testimony of Robert G. Partridge.)

I did, but I don't seem to be able to put my fingers on it.

Q. I have in my possession that which is a proposed draft of a will—if this is the one you are referring to, I don't know.

A. Yes, this is the one I am referring to. This is in 1950, it's antedated, yes, sir, sometime in the year of 1950 and before the preparation of this will you just handed me [82] or proposed will you just handed me, I had further discussions with Mr. Vogel about amending his will.

Q. To limit the time and to possibly refresh your memory, it has been stipulated in this case that the decedent and his wife had separate brokerage accounts with Dean Witter & Company, and the decedent's account was opened in 1946 and his wife's in 1948. Purchases by decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in wife's brokerage account were paid from a checking account at the Marina Branch of the Bank of America in the name of Les or Elizabeth Vogel. Having in mind the dates that the brokerage accounts were opened, decedent's account opened in 1946 and his wife's in 1948, does that refresh your memory at all as to when the discussions commenced in regard to the drafting of a proposed new will?

A. I am afraid not. I don't attach any particu-

(Testimony of Robert G. Partridge.)

lar significance, as I now remember the situation, to those brokerage accounts or bank accounts. The discussion I had concerning this latest proposed will from Mr. Vogel was sometime over a period of, again, weeks or maybe even months, prior to the drafting of the will.

The Witness: If I may interject a moment, your Honor.

A. (Continuing) Mr. Vogel was not particularly zealous [83] in pursuing these matters. We would talk about them and then when he, in his own good time he would come to see me, so these things went on rather interminably, is what I am trying to get at, so the discussions might very well have continued on or commenced at least for as long as six months prior to the draft of this will or longer or somewhat shorter. I know they were prolonged, shall I say, and finally culminated in me drafting this proposed will.

Q. Do you recall whether you drafted the proposed will or whether Mr. O'Connell drafted the proposed will?

A. I don't recall, but if the ordinary routine of our office was followed, Mr. O'Connell would have drafted it. I do not engage in this type of practice. Our usual custom is for me to secure such information as I feel, as I deem proper and necessary and transmit it to Mr. O'Connell who then draws the will, or drew the will.

Mr. Calhoun: I would like to have this proposed will marked for identification purposes.

(Testimony of Robert G. Partridge.)

The Clerk: Petitioner's Exhibit 14 for identification.

(Petitioner's Exhibit No. 14 was marked for identification.)

Q. (By Mr. Calhoun): Handing you Petitioner's Exhibit No. 14, marked for identification, is this a copy of the proposed will that was [84] drafted by your office?

A. That is the original.

Q. That is the original?

A. Yes, sir, of the proposed will drafted by our office.

Q. Which has never been signed, is that correct?

A. This one certainly hasn't, and it was my understanding that no other copy was signed.

Q. I will offer this proposed will in evidence.

Mr. Resnik: I will object to it, your Honor. It is not the will which was probated.

The Court: What is your theory of this?

Mr. Calhoun: My theory is that the question is at what time and when, if it happened at all, the property became separate property, how did the people treat it themselves, as separate property or as community property? It is just one of the links in the chain of evidence to show that this property was separate—this says right here—mind you, this was drafted before the death of the decedent—the date of his death is August 16, 1950, and this was drafted in 1950.

“Fourth: My said wife and I, having heretofore

(Testimony of Robert G. Partridge.)

and by written agreement converted our community property to separate property, and having segregated and separated the same, I hereby declare that it is my intention by this will to dispose of all property standing in my name as separate property, my wife having no community interest therein," and so [85] on.

Mr. Resnik: Please, may we be heard, your Honor?

Mr. Calhoun: If your Honor wants further corroboration on that point, I have Mr. O'Connell here to testify as to the actual drafting of the will.

The Court: Very well, Mr. Resnik.

Mr. Resnik: If your Honor please, the only foundation that has been laid for the introduction of Exhibit 14 for identification is that there was some discussions had between the witness now on the stand and the decedent with reference to the drafting of a proposed will. The witness himself has testified that he did not draft Exhibit 14 for identification.

Furthermore, there is no showing, since the will is unexecuted, that any statement therein comports with the decedent's concept of what he had in mind. It may have been completely contrary to this. We don't know. All we have is an unexecuted will.

Furthermore, the portion of the will read to you by Mr. Calhoun states, in paragraph Fourth: "My said wife and I having heretofore and by written agreement converted our community property to separate property", completely contrary to the fact

(Testimony of Robert G. Partridge.)

of record here, which at best is that there was no written agreement of transmutation, which is the testimony of the witness on the stand, and it is the testimony of that witness which is being offered as the basis for the offer of [86] Petitioner's Exhibit 14. On those grounds, we believe the exhibit should not be received.

The Court: The exhibit will be received.

(Petitioner's Exhibit No. 14 was received in evidence.)

Q. (By Mr. Calhoun): Handing you Petitioner's Exhibit 14 received in evidence, I will ask you if this was drafted from information obtained by you as to the wishes of the decedent Les Vogel.

A. Yes, it was.

Mr. Calhoun: No further questions.

Cross Examination

Q. (By Mr. Resnik): Mr. Partridge, did you ever prepare a written agreement for the Vogels which purported to transmute community property to separate property?

A. Not to the best of my recollection.

Q. I understand that you were the personal attorney of the Vogels for about 15 years?

A. Not of the Vogels. Of Mr. Vogel.

Q. Did Mrs. Vogel have her own personal attorney? A. I don't know.

Q. When did you first commence to serve Mr. Vogel as a legal adviser?

A. I can't answer that with accuracy. He had

(Testimony of Robert G. Partridge.)

some problems with one of the finance companies in San Francisco, the [87] Morris Plan Company, and it is my best recollection that that was the first time I served him.

Q. When was that?

A. I say, I can't answer that really accurately. It would be wild conjecture; if you want my best guess or speculation on it, I would say it was in the middle thirties, '35, along in there, '35 to '40, sometime in there.

Q. Did Mr. Vogel during the conversations he had with you preceding the drafting of the will, Exhibit 14, show you any written agreement which would have transmuted community property to separate property?

A. I have no recollection of him having done so.

Q. Did he discuss that with you?

A. Yes, he did.

Q. What did he say?

A. I have no recollection of that, save again a vague one that he had made a disposition of Mrs. Vogel's share of the company to her, and to his son, and he was interested in determining what provision, among other things he was interested in determining what provision he should make for his daughter, in equity and in fairness to all members of his family. I have a distinct impression or recollection that he, in discussing these things with me, shall I say, was under the impression that the share of the community property of Mrs. Vogel had been transferred to her as her own property. Now, I

(Testimony of Robert G. Partridge.)

can't [88] tell you whether he said that was in writing or was an accomplished fact through something that had been done on his behalf and on Mrs. Vogel's behalf by others. I know it wasn't, I am sure it wasn't, done by me.

Q. Do your notes reflect that conversation that you had with Mr. Vogel which served as a basis for the drafting of the unexecuted will, Petitioner's Exhibit 14?

A. Well, my conclusion as to what my notes reflect may or may not correspond with yours. I will be glad to show them to you.

Q. Would you hand me all of your notes, then, that relate to the drafting of the executed and the unexecuted will of the decedent?

A. Yes. Will you accept my apologies as I give them to you for their obvious inadequacy?

Q. Now, you have handed me nine yellow sheets which you believe purport to be your notes with reference to the drafting of the wills of Les Vogel?

A. Yes, sir. I don't believe that to be; I know they are.

Q. I notice that there are on the witness stand additional sheets of the same nature and I ask you if those contain any further information with reference to the drafting of the wills.

A. I was just about to look through them, to look for [89] that very thing, and if you will permit me to, I will.

Q. Please do.

A. And then I can answer your question. The

(Testimony of Robert G. Partridge.)

only thing that might fall within that category are some interpolated notes on drafts of wills, you see, marginal notes.

There are notes of Mr. O'Connell's here, but you are asking for my notes now only, Mr. Resnik?

Q. Yes.

A. These others that you were looking at are Mr. O'Connell's.

If I may now answer your question, I have no other notes purporting to reflect conversations with Mr. Vogel concerning the preparation of his wills other than the ones you have in your possession, and other than marginal notes in a draft of a will.

Mr. Resnik: I ask the clerk to mark one of the sheets that you handed me as Respondent's Exhibit next in order for purposes of identification.

The Clerk: Respondent's Exhibit E for identification.

(Respondent's Exhibit E was marked for identification.)

Q. (By Mr. Resnik): I show you, Mr. Partridge, Respondent's Exhibit E for identification and ask you whether you can determine whether that sheet represents notes relating to the probated will or [90] to the unexecuted will.

A. I am afraid that I cannot, sir. The only possible way I could identify it, if I knew, at the time, or whether the value of the stock, rather, in the Chevrolet Company, was then apparently given to me at \$200,000 each. That is the only way I can tell you. Otherwise it bears no date.

(Testimony of Robert G. Partridge.)

Q. However, at that time, Les Vogel, the decedent, whom you refer to as Les, advised you that Mrs. Vogel's interest, whom you refer to as "Mrs. Les", that her interest in the Chevrolet Company was community property?

Mr. Calhoun: It doesn't say that at all.

Mr. Resnik: I am asking the witness what it says.

Mr. Calhoun: I thought you said that.

Mr. Resnik: I am asking him, the witness.

Mr. Calhoun: You said at that time.

A. No. I can read what I wrote down, and the Court can place their own interpretation on it.

Q. (By Mr. Resnik): Yes, please do.

A. These notes say this: "Les Vogel and his wife each own stock of Chev Company valued at \$200,000 each. Mrs. Les got hers by gift from Les, although it was community property. No tax paid on transfer."

Now, I don't know the meaning, I can't tell you now the meaning of the word "was", whether that refers to the [91] present or it had been community property, I have no—wait a minute, I do. Just a moment, please. Now, that refers to, I am quite sure, that refers to the time the stock was transferred to Mrs. Vogel and not to the present time. When I said "although it was community property", I was then stating or reflecting what Mr. Vogel told me, that at the time that the stock was transferred it had been community property, rather than as of that date.

(Testimony of Robert G. Partridge.)

Q. Did you advise them that a gift tax or return had to be filed? A. I did not.

Q. Did you prepare such return for them?

A. No.

Mr. Calhoun: No gift tax return had to be filed in a division of community property.

Mr. Resnik: I am not certain of that at all, your Honor. That is a legal matter.

The Court: There is no purpose served in arguing.

Mr. Calhoun: But he said, "Did you advise them that a gift tax or return had to be filed?" leaving the inference that a gift tax return had to be filed in a division of community property, and it doesn't have to be filed.

Mr. Resnik: I will ask the Clerk to mark another sheet.

Mr. Calhoun: I would like to offer that sheet in [92] evidence, if your Honor please, the one that has just been marked Respondent's Exhibit E. I would like to offer that in evidence.

The Court: Do you wish to join in this, Mr. Resnik?

Mr. Resnik: No, your Honor.

The Clerk: No. 15, then, your Honor.

The Court: It will be marked 15.

The Clerk: Respondent's Exhibit E for identification is admitted in evidence as Petitioner's Exhibit 15.

(Testimony of Robert G. Partridge.)

(Respondent's Exhibit E for identification was received in evidence as Petitioner's Exhibit No. 15.)

The Clerk: Respondent's Exhibit F for identification.

(Respondent's Exhibit F was marked for identification.)

Q. (By Mr. Resnik): I show you, Mr. Partridge, another sheet of your notes, marked Respondent's Exhibit F for identification——

Mr. Resnik: If counsel will permit, I think we can agree that these notes relate to the second, unexecuted will, Exhibit 14?

Mr. Calhoun: Agreed.

Q. (By Mr. Resnik): And I would like you to satisfy yourself also that that is the case, so would you pursue it? [93]

A. I can't satisfy myself from looking at it, although I would suspect it was. If you two gentlemen agree, I suppose there is nothing for me to disagree about.

Mr. Resnik: If we may go off the record for a moment, I think we can satisfy counsel, too, and save a lot of time.

Q. (By Mr. Resnik): You will notice, Mr. Partridge, a note here, "\$500 to satisfy the housekeeper."

A. I am not sure that was in the first at all, but I have no quarrel with your conclusions on the subject. I just am unable to tell on there.

Mr. Calhoun: Stock there?

Mr. Resnik: Yes.

(Testimony of Robert G. Partridge.)

Mr. Calhoun: If it says stock, I will agree, because there wasn't any stock in the first will, as a partnership, at the time it was prepared.

Q. (By Mr. Resnik): I will ask you to read to us a sentence that begins: "Draw agreement, et cetera."

A. Draw agreement constituting transfer of stock—"Division", I take it, that is—does that look to you—"Division of community property and transmuting same."

Q. So that, with reference to the second will, there was some discussion as to the drafting of a written agreement [94] transmuting the property, that is, the interest in the Les Vogel Chevrolet Company?

A. That was a discussion instituted by and not Mr. Vogel, as I recall it, sir.

Q. And, as a result of that discussion, no such agreement was drawn by you, was there?

A. Well, I can only say that I haven't any recollection of any agreement being drawn. I can't say that it was as a result of that discussion, Mr. Resnik.

Q. Your files do not contain such an agreement?

A. We have been unable to find one.

Mr. Resnik: I should like to offer in evidence Respondent's Exhibit F for identification.

Mr. Calhoun: No objection.

The Court: It will be received.

(Respondent's Exhibit F was received in evidence.)

(Testimony of Robert G. Partridge.)

Mr. Resnik: I will ask the Clerk to mark another sheet of the notes of Mr. Partridge's for identification.

The Clerk: Respondent's Exhibit G for identification.

(Respondent's Exhibit G was marked for identification.)

Q. (By Mr. Resnik): I will show you a sheet of your notes which has been marked Respondent's Exhibit G for identification and I [95] will ask you if it is possible for you to relate that sheet to either the executed will, probated will, or to the unexecuted will.

A. It refers to the corporation as in existence at that time.

Q. Oh.

A. Apparently.

Q. I see. So, from that, you would assume that it related to the second will, when the corporation was in existence?

A. Yes, sir. I have discussed, I mean, rather, I have reflected the statement that the correct name of the company is a corporation, name of the five directors, the name of the assets, and I have to assume, I have no independent recollection, I have to assume that it refers to the second will, or the proposed will.

Mr. Resnik: We will offer in evidence Respondent's Exhibit G for identification.

Mr. Calhoun: No objection.

The Court: It will be received.

(Testimony of Robert G. Partridge.)

(Respondent's Exhibit G was received in evidence.)

Q. (By Mr. Resnik): I show you, Mr. Partridge, Petitioner's Exhibit 13 and direct your attention to a phrase that appears thereon: "Transmutation Agreement (January 1, '43)." I ask you what [96] you sought to convey to yourself or Mr. O'Connell by that note.

A. I sought to convey to myself and consequently to Mr. O'Connell that that transmutation agreement had been executed between Mrs. Vogel and Mr. Vogel on January—I say executed; it had been entered into—I repeat, as I told you, I have recollection now, whether he said or anyone said it was in writing or it came about by something that had been done, but that in any event the community property had been transmuted by writing or otherwise on January 1, 1943.

Q. When you say "the community had been transmuted", what do you mean by that?

A. I mean that it had been divided into the separate property of each.

Q. That is, whatever was community property before had become the separate property of, one-half the separate property of Mr. Vogel and the other half the separate property of Mrs. Vogel?

A. Not all that was community. This related to the business, the interest in the Chevrolet agency, rather than stocks, bonds, securities, home and things of that sort.

Q. What else did Mrs. Vogel own at that time?

(Testimony of Robert G. Partridge.)

A. I don't know, but my notes reflect certain items of property here—I will be glad to read them to you. But that is all the information I have on it. [97]

Q. What do your notes reflect as to what they possessed at the time that you drew the will that was executed?

A. They reflect that the Les Vogel Chevrolet Company was a co-partnership, that Mr. Les Vogel, deceased, was a general partner owning a third of the partnership, that Les, Jr., was a partner owning a third of the partnership, that Mrs. Elizabeth Vogel was a limited partner owning a third interest, that the net value of the partnership was at that time \$350,000, that—here is a note that was made and scratched out—that Mr. Vogel, Jr., signed a note payable to Mr. Vogel and Mrs. Vogel for \$3,300—or that could be 3, I am not sure—\$3,000. Could you assist me here? Does that look like “33” to you?

Q. Possibly it could be 33 thousand.

A. Thirty-three thousand dollars. That there was property on Mission Street purchased with \$50,000 taken out of the partnership, that yielded 8 per cent per annum, which left a net worth to the incorporation of \$275,000—that it was incorporated for \$150. There is a notation “Loan to corporation for \$125,000.” I have no recollection of what that means at this time. It is further reflected that Mr. Vogel deemed that he had \$20,000 in life insurance, \$30,000 in cash, \$16,000 in bonds,

(Testimony of Robert G. Partridge.)

and a hundred thousand dollar interest in the business.

And yet, in a similar notation appearing just opposite that, those figures were changed, the first figures were [98] scratched out, rather, and at that time he told me that there was \$20,000 worth of life insurance upon his life, that he possessed \$30,000 in cash, \$31,000 in bonds and \$116,600 as interest in the business, or a total of \$197,600.

And at that time Elizabeth, who was Mrs. Vogel, Elizabeth Vogel had \$18,000 in cash, \$20,000 in cash—you will have to decipher this figure with me, if you will, it's either 10 or—it's been imprinted over—it looks to me like it finally ended up as \$10,000 in bonds, do you agree?

Q. Yes.

A. HSF (Household Furniture) on Marina Boulevard plus inheritance, that Mr. Vogel, Jr., at that time had \$20,000 in cash, a thousand dollars in bonds and one-third of the business plus the inheritance.

Does that answer your question?

Q. What did the transmutation agreement that you refer to in your notes seek to do? You understand, with reference to the property that you have stated was owned by Mr. and Mrs. Vogel.

A. I don't think I understand your question, sir.

Q. You have stated in your notes, Exhibit 13, that you received some information about a transmutation agreement.

A. I see.

(Testimony of Robert G. Partridge.)

Q. January 1, '43. A. Yes. [99]

Q. What did that agreement, as you now recollect, propose to achieve, with reference to the properties that you delineated, that were possessed by the Vogels at that time?

A. To transmute to Mrs. Vogel one-third of the interest in the Chevrolet Company as then constituted.

Q. And nothing more?

A. That is right. There was never any discussion that I remember concerning any other things, other than the Chevrolet Company.

Q. Did you pursue that matter with Mr. and Mrs. Vogel at all, the matter of the transmutation agreement, at that time?

A. No then. I did later.

Q. When you say "later", when later?

A. When we were talking about the second will.

Q. What discussions did you have at that time?

A. Mr. Vogel—these notes now remind me—had taken a position when he talked to me initially that this property had been transmuted. He didn't know the details, and I didn't either, frankly. I felt that in order to sanctify the situation or to implement it, shall I say, assuming it had been done in the first place, it would be better to have some expression in writing, and I suggested that to him, and that is reflected in those later notes that are now in evidence—I have forgotten the exhibit number—but again it was something, a relationship something like this, Mr. Resnik: Mr.

(Testimony of Robert G. Partridge.)

Vogel was not skilled [100] in the law or in the ways of business or estates of this sort. When he did talk to me initially he always took the position, "This is Mrs. Vogel's property," as her own, but he was never able to very clearly, or at all clearly, tell me why it was. Therefore, when you ask me whether I pursued it, I did at the time this second will was discussed, and at that time said we ought to set it down in writing so there would be no question about it.

Q. Did you discuss that at all with Mrs. Vogel?

A. Not to my recollection.

Q. And Mr. Vogel used the term "separate property" and the term "community property"?

A. Undoubtedly, but I can't sit here and tell you that I specifically remember it. Whatever terms he used, may I say, that he conveyed to me, as we were discussing these matters, that he was under that impression, the interest of Mrs. Vogel in the company was her own property, as such, call it separate, as it should be, or otherwise, the effect that I gathered or the understanding that I gathered from his discussions was the same.

Q. Didn't some difference of opinion arise between you and Mr. Skinner as to the nature of a property of the Vogels at the time that it was necessary to file the estate tax in the estate of J. Leslie Vogel?

A. I think that could be better answered by Mr. O'Connell. [101] I did very little in connection with the probate of the estate. I might state that there

(Testimony of Robert G. Partridge.)

have been differences of opinion between Mr. Skinner and me on various occasions on various subjects. Whether they have included that question, I can't answer, but Mr. O'Connell was the one who took the active interest in the probate of the estate. I did not.

Q. Did you take any part in the preparation of the income tax returns of the Vogels during their lifetime? A. No.

Q. You are not familiar with that?

A. Familiar as to whether I took any part in them?

Q. Familiar with the returns as filed or the declarations made in such returns, as to the nature of the property.

A. No, I have no recollection of ever having seen one.

Q. Do you recall having a meeting with Mr. Emil Kubik, State Tax Agent, who sits at my right?

A. I have seen the gentleman before. I talked to him before. But I couldn't tell you when.

Q. Do you recall that in late 1955 at your office on two occasions—I am sorry, the early part of 1955, in January 1955—you had two discussions with Mr. Kubik with reference to the estate now in question?

A. I recall talking to the gentleman sitting to your right, whom you have identified as Mr. Kubik, and I also recall talking to someone in my office, at least on one occasion, about [102] the estate of Vogel. I am unable to tell you whether it is the

(Testimony of Robert G. Partridge.)

same gentleman you have identified as Mr. Kubik or not. I do not deny it, and if you tell me that he was, then he is the one who was there. I just have no recollection on the subject.

Q. Do you recall that at that time you made a statement that, to him, that you believed all the property owned by the Vogels at the time of Mr. Vogel's death was community property?

A. No, I don't, I have no recollection of that.

Q. Do you further recall that you made a statement to Mr. Kubik in the conference of January 14, 1955, that you had no knowledge of any agreements relative to the transmutation of community property to separate property?

A. That was my frame of mind and always has been, so I would not doubt that I told him that. But I have no independent recollection of it.

Q. Didn't you tell Mr. Kubik in the meeting of January 18, 1955, that in your view, having known Mr. Vogel for many years and having counselled him in legal matters for many years, that you believed he didn't know the difference between community property and separate property or jointly owned property?

A. I might have. I can't tell you whether I did or did not.

Q. Don't you recall telling Mr. Kubik at that time that [103] in your impression, after having counselled Mr. Vogel in legal matters and having assisted in the preparation of his will, that you believed he regarded everything as community prop-

(Testimony of Robert G. Partridge.)

erty, since it was all accumulated through the efforts of himself in his business endeavors?

A. If I may make this comment—no. First, of all, let me answer your question. I don't recall saying that. To the best of my recollection, I have no notes reflecting that. To the best of my recollection, Mr. Kubik came in one day, I remember one day, I don't deny it, it might have been two days, and we spoke rather lightly in general over the counter in our office, and I may very well have told him that in my judgment Mr. Vogel didn't really know the difference, meaning legal significance, between separate and community property, and I think that is possibly the fact, but that my impression of Mr. Vogel's activities or position in the matter was that he felt he had turned over to Mrs. Vogel, as her property, her share of the business, that I didn't know how it had been accomplished and hadn't been able to find out and didn't know whether, in fact, it had been accomplished. And I still don't know. Now, that was the general tenor of my discussion with Mr. Kubik, as I remember.

Mr. Resnik: No further questions at this time.

Mr. Calhoun: I would like to ask one question.

Redirect Examination

Q. (By Mr. Calhoun): You are familiar, are you not, with the fact that division of community property does not result in a gift tax?

A. No, I won't admit that. I don't do tax work

(Testimony of Robert G. Partridge.)

or state work. I am glad Mr. Vogel didn't ask me if it needed to be taxed, because I could have given him no correct answer. I am ashamed to admit that, your Honor, but I do no tax work whatsoever.

Mr. Calhoun: No further questions.

The Court: You may be excused.

(Witness excused.)

Mr. Calhoun: I will call Mr. O'Connell.

Whereupon

WALLACE O'CONNELL

a witness called by and on behalf of the Petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: Be seated and state your name, please.

The Witness: Wallace O'Connell. Although my lawful name is William Wallace O'Connell, I don't use the name William in business at all. That is my full true name.

Direct Examination

Q. (By Mr. Calhoun): You are an attorney-at-law, are you not? A. I am.

Q. And you are associated with Mr. Partridge?

A. I am. [105]

Q. I hand you what is marked Petitioner's Exhibit 14, purporting to be a proposed will or draft of the last will and testament of J. Leslie Vogel, as has been previously identified. Did you have anything to do with the making of that draft?

(Testimony of Wallace O'Connell.)

A. Yes, I would say that the verbiage and so forth, insofar as it contains any amendments of the original will, and there were substantial ones, were all my work.

Q. Do you have any notes of your own concerning that draft, and particularly concerning Paragraph Fourth?

A. Well, let me say this, that I have here two classes of notes, a long sheaf of them representing drafts of the exact verbiage of this proposed will and one proposed for Mrs. Elizabeth Vogel, and then a couple of others—if I may look at those again, please—that are general notes made in conference, I would say, with Robert Partridge, preparatory to my drafting the will.

Q. Do you have any note in there that relates to Paragraph Fourth?

A. I believe—I see here my longhand draft of the amendment to Paragraph Fourth from the original will that was in the file. This is my longhand, it is no more than an exact transcript of what was typed into Fourth, Paragraph Fourth.

Q. Before you drafted that did you have any preliminary notes? [106]

A. Yes, I do.

Q. What?

A. I have a sheet here, that is, of my notes made at the time, after consultation between Mr. Vogel, Sr., and Mr. Partridge, that represent Mr. Partridge's extract or comment summation of his notes to me, instructing me as to what he wanted accomplished.

(Testimony of Wallace O'Connell.)

Q. Can you point out any reference there as to Paragraph Fourth?

A. Not any specific reference to Paragraph Fourth. There are some notes here having to do with the same general area of—

Q. That is what I mean, the same general area.

A. Or subject.

I have a note here, verbs and so forth are left out of these notes, it says, "To leave no doubt, an agreement transmuting community property"—this is all in shorthand—"Com prop to her prop"—that would mean community property to her separate property.

Q. Do you recall why you said, "To leave no doubt"?

A. I don't. I don't. All that I can say is that when I came to drafting the will in its final form—and when I say "final form", the form we submitted to Mr. Vogel to execute some weeks or a month or two before his death—I prepared Paragraph Fourth of this as it now reads, which recites a segregation. [107] That is based on some oral impression of mine at the time.

Q. Handing you what has been marked Petitioner's Exhibit No. 13 in evidence, which has been identified as being entirely in the handwriting of Mr. Partridge, did you have this information available to you when you drew the second will, proposed draft of the second will?

Mr. Resnik: I think the question is vague and misleading. It is not a question of whether it was

(Testimony of Wallace O'Connell.)

available. Undoubtedly it must have been in the office.

Mr. Calhoun: We can find out whether it was and then I can go on from there, if your Honor please.

The Court: Proceed.

Q. (By Mr. Calhoun): Answer the question.

A. I had all of Mr. Partridge's notes available and in hand, I would say.

Q. Did you go over those notes?

A. To the extent I was in any doubt or confusion as to any date or detail.

Q. Did you happen to see where it says "Transmutation agreement (January 1, '43)"?

A. If I may answer that this way, I would say—we have been talking here of the so-called second will?

Q. That is right.

A. And these notes that you now show to me, this Exhibit [108] 13 for the Petitioner, are notes back at the date of the original will, in the '46 will, with which I had some limited connection also. Whether I had these notes before me—you see, this is a will filed, we would have preserved a will file for Les Vogel from the time we first drew his will, and those notes would have been in there, I might have thought it necessary or not necessary to go over them at the time of the second one, and I cannot answer it.

Q. I am trying to bring out if you have any recollection as to why you said in your Plaintiff's

(Testimony of Wallace O'Connell.)

Exhibit 16, which has been marked for identification, I don't believe it has been admitted yet, "To leave no doubt, an agreement transmuting com property to sep property."

Mr. Resnik: If your Honor please, the question has been asked and answered and I think it is objectionable on that ground. He stated that he had no recollection.

The Court: You may answer.

A. The only thing that I can say in that regard, that looks, it looks there, as it sits there, and it is not in my memory at the time, that Mr. Partridge may have suggested that I give consideration whether we should prepare a formal recital of what was done in the form of a formal transmutation agreement, the words "To leave no doubt". Now, I would be, not speculating, but my memory is this, that at some stage at some date, and it may have been this date of January 1, '43, [109] a partnership was created, and that was some kind of a writing that segregated this business into separate interests, and he may have asked me for an opinion, which I may have even researched or given him some answer on at that time or given him some conclusion of my own, that was sufficient in and of itself to segregate, but I have no recollection of it now.

Mr. Resnik: I move that the answer be stricken as indicating no present recollection or knowledge on the part of the witness, as reflected in the answer itself.

(Testimony of Wallace O'Connell.)

The Court: Motion denied.

Mr. Calhoun: I will offer in evidence Petitioner's Exhibit 16, to be marked for identification.

Mr. Resnik: No objection.

The Court: It will be received.

(Petitioner's Exhibit No. 16 was marked for identification and was received in evidence.)

Mr. Calhoun: Could I call Mr. Hardy, who is right here, for about three questions, and that is all? I would like to be able to let him go on his way. He is very anxious to get away. He came up here without a subpoena.

The Court: You may step down, Mr. O'Connell.

(Witness temporarily excused.)

Whereupon

ARTHUR M. HARDY

a witness called by and on behalf of the Petitioners, being [110] first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Arthur M. Hardy.

Direct Examination

Q. (By Mr. Calhoun): What is your occupation, Mr. Hardy?

A. I am a building contractor.

Q. Did you ever have occasion to build a building called the Anse Vista Apartments?

A. I did.

(Testimony of Arthur M. Hardy.)

Q. In that connection, whom did you negotiate with in regard to that building?

A. I designed and built the building for Eliza-Vogel.

Q. Did you negotiate with Mr. Vogel or did you negotiate with Mrs. Vogel?

A. All my negotiations were with Mrs. Vogel.

Q. Do you know whether or not the property stood in her name?

A. It did at that time. In fact, I believe she bought it from me. I owned the property originally and sold it to Mrs. Vogel and then negotiated and built the building for her.

Q. Did you have any understanding of whom you were building it for?

A. I was building it for Mrs. Vogel.

Mr. Calhoun: No further questions. [111]

Cross Examination

Q. (By Mr. Resnik): When did Mrs. Vogel first acquire the property from you?

A. Well, I would say somewhere around seven years ago, if I recall right. I don't know exactly. I bought the property originally myself when the tract was first built in Anse Vista. I was the original owner of that property, after it was developed on that cemetery property up there.

Q. It could have been around May 1950?

A. It could have.

Q. Did Mrs. Vogel buy the lot from you?

A. She bought the lot from me, yes.

(Testimony of Arthur M. Hardy.)

Q. And then you designed an apartment house that went on it? A. That is correct.

Q. Do you know where Mrs. Vogel acquired the money for you to buy the lot?

A. I have no idea.

Q. Do you know where she got the money to buy the building, to have the building built, that went on it? A. I have no idea.

Mr. Resnik: That is all.

Mr. Calhoun: No further questions.

The Court: You are excused. [112]

(Witness excused.)

Whereupon

WALLACE O'CONNELL

a witness called by and on behalf of the Petitioners, having been previously sworn, resumed his testimony as follows:

Mr. Calhoun: I have no further questions of Mr. O'Connell.

Cross Examination

Q. (By Mr. Resnik): If you had researched the question and written an opinion with reference to transmutation of property, wouldn't your files reflect that?

A. If I had written an opinion, it would, but I may have given an opinion without writing it, just expressed the opinion of necessity, and I have no recollection of having done so or not having done so.

(Testimony of Wallace O'Connell.)

Q. Did you assist in the preparation of the income tax returns of the Vogels prior to Mr. Vogel's death? A. No.

Q. Were you familiar with how they reported their income for tax purposes?

A. No, I never was.

Q. Did you have any discussions with Mr. Skinner as to how the estate tax return should be prepared after Mr. Vogel's death? [113]

A. As far as our office was concerned, I was the one primarily engaged in the problems of the probate, and Mr. Skinner and I conversed on several occasions, and I think the upshot of our discussions was that it would be to the best interests of the family to call in someone certainly more expert than our office in matters of taxes and I think it was the concensus of Mr. Skinner and myself that Mr. Jacobs was brought into the picture, Mr. Tevis Jacobs, and following that we did no original thinking whatever on the question of returns.

Q. I show you, Mr. O'Connell, Petitioner's Exhibit 16 in evidence and ask you if you will read for us the third and fourth and fifth and sixth sentences appearing on that page.

A. These, of course, are scattered, shorthand almost, you might say. It says, "Eliz (meaning Elizabeth), Jr. and Sr. own one-third each—some-time ago. Elizabeth received one-half of Senior's two-thirds, but no agreement to take in lieu of com prop (community property, I would say) strictly

(Testimony of Wallace O'Connell.)

speaking, Eliz". I am sorry, I don't know what that means, other than what it says.

Q. It does say that there was no agreement between them, isn't that clear?

Mr. Calhoun: It doesn't say that at all.

Mr. Resnik: Please, Mr. Calhoun. I am asking the witness the question. He shall answer it. [114]

The Witness: I shall try.

Mr. Calhoun: I would not want him misled as to what it does and what it doesn't say.

A. "But no agreement to take in lieu of community property," I don't know what that may mean at this time.

Q. (By Mr. Resnik): Did you meet with Mr. Vogel at any time in connection with the preparation of the executed will or the—an executed will?

A. I will say, I did not see Mr. Vogel in connection with the executed will. At that time I was an employee in the office. I am uncertain whether I may not have witnessed the will, and I may have been responsible for the language, particularly of the trust provisions. I don't believe I discussed it at all with him. The second time, yes, I did take a larger part in it, although I don't believe I was present at discussions in the office. I believe I talked to Mr. Vogel on the telephone on one or two occasions regarding specific matters, not the over-all picture, and certainly, I would say, not in connection with anything that has been discussed here this morning.

Q. So that you received no firsthand knowledge

(Testimony of Wallace O'Connell.)

from Mr. Vogel with reference to the character of the property held by the Vogels at the time you were considering a drafting of the will?

A. I would say not. I would say that all of my information [115] came from Mr. Partridge in summation to me and I wrote it up as I understood it to be.

Mr. Resnik: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Calhoun): In the first will, the one that was admitted to probate, there was the right of election to take into the will in lieu of community property, was there not?

Mr. Resnik: I believe this goes beyond the scope of the cross examination. Furthermore, the witness testified that he had no communication with the Vogels as to the drafting of the first will, since he was only an employee in the office.

Mr. Calhoun: If your Honor please, the purpose of that——

Mr. Resnik: I will stipulate as to what the will shows. It is in evidence, your Honor.

Mr. Calhoun: The purpose of that, he was referring to some notes, and I don't know whether you have those notes, Mr. Resnik——

The Court: Counsel approach the bench.

I have to leave promptly at 4 o'clock this evening. Do you think you can finish before 4 o'clock, before that time?

(Testimony of Wallace O'Connell.)

Mr. Resnik: No, sir, we cannot.

Mr. Resnik: Ten o'clock tomorrow morning?

The Court: Nine-thirty. [116]

Q. (By Mr. Calhoun): The proposed will, since there was separate property mentioned in there, had no provision in it to elect as to separate property?

A. The one that Mr. Vogel had at the time he died?

Q. Which he hadn't executed.

A. Your question is?

Q. I will reframe it. In the first will, there was a provision in which the spouse could elect, either take into the will in lieu of community property or take her community property, right? A. Yes.

Q. In the second will, you have stated in there the property is separate, in paragraph 4, so there would be no need for such a provision, isn't that true?

A. Well, that is what paragraph 4 of the proposed will and of Mrs. Vogel's proposed will, both concurred——

Q. With that in mind, with regard to your notes, right above No. 1, on Petitioner's 16, would that have any reference to that particular elimination of that provision?

A. I can't answer that. I am sorry.

Q. Will you read what that says?

A. It says "Strictly speaking (comma), election."

Q. Read the beginning of it.

(Testimony of Wallace O'Connell.)

A. Oh, yes. What I read before, "Elizabeth, Junior [117] and Senior own one-third each, some-time ago. Elizabeth received one-half of Senior's two-thirds but no agreement to take in lieu of com prop (community property). Strictly speaking, election."

Q. You don't know any more than you did at first?

A. No. The wills as finally prepared are the upshot of my knowledge and understanding.

Mr. Calhoun: No further questions.

Recross Examination

Q. (By Mr. Resnik): Did you prepare a will for Mrs. Vogel in 1946? A. No, sir.

Q. You testified that a proposed will for Mrs. Vogel was prepared at the time of the drafting of the second and unexecuted will?

A. Roughly, the preparation of it arose out of the same conferences and discussions had and it was prepared roughly at the same time—if I am not mistaken, I got hers out before his.

Q. Do you have a copy of that with you?

A. Yes, I do. That was sent to her by Mr. Partridge and then at the death of Mr. Vogel—that wasn't completed, either, that is.

Mr. Resnik: We will offer as a joint exhibit the unexecuted will drawn up by Partridge and O'Connell, the [118] unexecuted will of Elizabeth Vogel.

The Court: It may be received.

The Clerk: Exhibit H-17.

(Testimony of Wallace O'Connell.)

(Respondent-Petitioner's Joint Exhibit No. H-17 was marked for identification and was received in evidence.)

Q. (By Mr. Resnik): At the time that you drafted the will of Mrs. Vogel, Exhibit H-17, did you have any discussions with her?

A. Yes, I think, I believe so, in the presence of Mr. Partridge and Mr. Vogel, Sr. They consulted together on at least one occasion with Mrs. Vogel in the office and I was there, and there were a number of consultations with Mr. Vogel.

Q. Did you make inquiry of Mrs. Vogel or Mr. Vogel as to whether or not any written agreement converting community to separate property had been made?

A. I made none such. I don't remember any such being made.

Q. Was any such agreement ever handed you?

A. No.

Q. Was any such agreement prepared by you or your firm? A. None.

Mr. Resnik: I have no further questions.

Further Redirect Examination

Q. (By Mr. Calhoun): That agreement, for the record, page 1, the original [119] and the copy were found together, and there was never assembled into two separate copies the proposed will for Mrs. Les Vogel, isn't that true?

A. That is true, yes. There is in the file here a

(Testimony of Wallace O'Connell.)

letter forwarding to Mrs. Vogel a copy of the draft on the date of July 14, 1950.

Q. And Mr. Vogel died August 16, 1950, isn't that true?

A. I am not certain of the date. It was in the early fall of 1950. He had had his copy of the will, as I recall, a month or so, and I called him one day and he said he would be down, he would be down, and a week later he was dead.

Mr. Calhoun: I have no further questions.

The Court: You are excused.

(Witness excused.)

The Court: We will suspend until 9:30 tomorrow morning.

(Whereupon, at 3:40 o'clock p.m., Thursday, June 20, 1957, the hearing in the above-entitled matter was recessed, to reconvene tomorrow, Friday, June 21, 1957, at 9:30 o'clock a.m.)

Friday, June 21, 1957

Proceedings

The Clerk: The Court is now in session, Judge Van Fossan presiding.

Mr. Calhoun: Mrs. Vogel, will you resume the stand, please?

The Court: The oath that you have taken obtains throughout the hearing.

Mr. Calhoun: I would like to introduce a copy of the estate tax return in evidence.

Mr. Resnik: No objection, your Honor, to the copy being received.

The Clerk: Petitioner's Exhibit 18 admitted in evidence.

(Petitioner's Exhibit No. 18 was marked for identification and was received in evidence.)

Mr. Calhoun: I would like also to introduce in evidence a copy of a document entitled "In the Matter of the Estate of J. Leslie Vogel, Probate No. 118643, First and Final Report of Executors," et cetera.

Mr. Resnik: We have no objection to the receipt of a copy of such report, if your Honor please. We do not believe that it has any materiality to the issues in this proceeding. Further, we do not believe that the document is self-proving in itself. It merely states what the Executors did, and of course couldn't resolve the issue in this proceeding. [123]

Mr. Calhoun: If your Honor please, that is not the purpose. The purpose is that in any estate, as far as taxwise is concerned, certain property in the inventory of the estate has a tax effect, property outside the inventory has a tax effect, and the return does not always disclose what property is in the inventory and what property is out of the inventory, and the final report shows what the executor was charged with, as being in the inventory.

The Court: It is received.

The Clerk: Petitioner's 19 in evidence.

(Petitioner's Exhibit No. 19 was marked for identification and was received in evidence.)

Mr. Calhoun: We have the affidavit concerning community property, together with what is known

as the inheritance tax affidavit; these are copies which we would like to offer.

The Court: Made by whom?

Mr. Calhoun: Made by the, one signed by Elizabeth Vogel — Elizabeth Vogel has signed both of them, as co-executrix.

The Court: Any objection?

Mr. Resnik: We do not object, again, your Honor, to the copies, nor do we object to the fact that such documents were filed for state probate proceedings and perhaps for state inheritance tax proceedings. We would say that the documents again are not self-proving, nor can they resolve [124] the issue for federal estate tax purposes, and on that basis we will object.

The Court: They will be received.

The Clerk: Petitioner's Exhibit 20 in evidence.

(Petitioner's Exhibit No. 20 was marked for identification and was received in evidence.)

Mr. Calhoun: If your Honor please, there are certain bonds listed on the return, in Schedule E of the return, under "Jointly Owned Property." it is stated in Item No. 5: "Series E U. S. Bonds, face amount \$7,050, actual value at date of death \$6,850. Standing in the name of Les Vogel or Mrs. Elizabeth Vogel." And they put the value. They then also say: "Six Series E U. S. War Bonds, face amount \$12,000, actual value at date of death \$9,920. Standing in the name of Les Vogel or Les Vogel, Jr." And there is no value put to those. It is the contention that they are not the property of the decedent.

Item No. 7: "Series E U. S. War Bonds, face amount \$22,050, actual value at date of death \$19,585. Standing in the name of Mrs. Elizabeth S. Vogel or Les Vogel." And those were listed with no value for the tax return. In other words, they were disclosed in the return, that such bonds did exist, but they were not, they were contended by the return as being non-taxable in the estate.

I would like to discuss this matter with counsel. [125] If those amounts are correct, and the names in which they stand, we would like to stipulate that they are, rather than going through all the proof of proving what they were. Is that correct?

Mr. Resnik: I am prepared to say that the bonds were standing in the names as appearing on the estate tax return schedule E. I want to satisfy myself as to the value.

The Court: I assume the lower value of these bonds was because they had not matured?

Mr. Calhoun: Face value, and they had not matured.

Mr. Resnik: If your Honor please, we are prepared to stipulate as to the matter of the value that is shown, lesser value being due apparently to the fact that they hadn't matured. However, we further wish to direct the attention of the Court to the fact that Item 6 appearing on Schedule E, Series E Bonds standing in the name of Les Vogel or Les Vogel, Jr., are not part of the subject of the controversy and have not been included, and therefore any reference to them in this proceeding is completely immaterial. We have no objection to agree-

ing to it, but we don't want the Court to be confused by our stipulation that that Item 6 is in any way brought into controversy here.

The Court: It will be received.

Mr. Calhoun: Further, the 90-day letter, on page 2, subparagraph (b), under Item 3, other miscellaneous property, [126] Schedule F, showing increase, there was included four shares of Pacific Turf Club stock, 500 shares of Pacific Gas & Electric redeemable first preferred, 467 shares of Bank of America, 217 shares Pacific Gas & Electric common, 250 shares Leslie Financing Company, also Anse Vista Apartment property, savings account Marina Branch of the Bank of America. As to the stocks, I would like to stipulate that those particular stocks stood in the name of—without prejudice to the type of property they are—they actually stood in the name of Mrs. Vogel.

Is that correct?

Mr. Resnik: No. Information in the record already with reference to the Bank of America stock, being the correspondence from the bank; we also have evidence in the record as to the Pacific Gas & Electric stocks, and I would just as well have the record reflect what the exhibits show on that.

As to the Pacific Turf Club stock, there is testimony in the record that some shares of that stock, some shares were in the name of the decedent, such testimony having been brought out by the decedent's son.

As to the savings account, Marina Branch, our stipulation covers that, I believe.

Mr. Calhoun: I am just talking about the stocks now, please. We will come to the apartment house and the savings account. You see, there were four shares of Pacific Turf [127] Club stock in the decedent's name, and also four shares in her name. That is why I am trying to clear this by stipulation, rather than go through all the proof as to that particular point.

Mr. Resnik: Of course, in this respect, your Honor, it should be pointed out that to the extent that any items of stock or other property appearing in the name of the decedent which were included in the return as his separate property were by the theory of the Respondent and by appropriate adjustment in the statutory notice reduced by one-half because under the theory of the Respondent that was held to be community property. Accordingly, if the Court were to hold the property here was in some way segregated, then the reduction as to the other items that are community property would have to be restored. The Petitioner could not be contending otherwise.

Mr. Calhoun: I agree to that. The only thing I am asking is——

Mr. Resnik: We are now prepared to agree that the items of stock appearing in Schedule F on page 2 of the statutory notice of deficiency were in the name of the decedent's widow.

The Court: Is that what you wish?

Mr. Calhoun: Yes. May that, then, be received as a stipulation, your Honor?

The Court: It may be so stipulated. [128]

Mr. Calhoun: The Anse Vista Apartment property, was that standing in her name alone?

Mr. Kubik: Yes.

Mr. Resnik: As to the Anse Vista Apartment property, your Honor, it might be significant to ascertain just how that property was held, not only in name, but in any other legend that might appear.

Mr. Calhoun: I agree with that. I am just asking if they will stipulate as far as the title of the property, it was in her name alone, and not on the decedent's and her name, it was actually in her name, irrespective of the legal effect of it, that is all, just like the bonds.

I understand that is true, Mr. Kubik.

Mr. Kubik: That is correct.

Mr. Resnik: As to the bare name alone, we will stipulate, but the stipulation does not go beyond that.

The Court: Very well.

Mr. Calhoun: As to the savings account, Marina Branch, Bank of America, that is the savings account we have stipulated as being in the name of Elizabeth Vogel.

Is that correct, Mr. Kubik?

Mr. Kubik: I didn't follow the question.

Mr. Calhoun: This savings account down here.

Mr. Kubik: That is correct. That is right.

Mr. Calhoun: Very well. [129]

Whereupon

ELIZABETH VOGEL

a witness recalled by and on behalf of the Petitioners, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Resumed)

Q. (By Mr. Calhoun): Mrs. Vogel, you have heard the discussion as to certain stocks standing in your name alone. You knew, did you not, that your husband had his own separate brokerage account?

A. Yes.

Q. Do you recall the date that your brokerage account was opened with Dean Witter, or the year, as closely as you can?

A. I think it was 1948.

Q. As far as the business of Les Vogel Chevrolet Company was concerned, do you recall when you became a limited partner in January of 1943?

A. I think I wrote that down.

Q. We have stipulated as to the date the limited partnership started, Mrs. Vogel. A. What?

Q. We have stipulated, we have agreed that the date—— A. That is when it was.

Q. Yes, but do you recall when you became a limited partner?

A. (No response.) [130]

Q. Do you recall, do you remember the time?

A. Yes, I do.

Q. What was your interest in the business?

A. Third interest.

(Testimony of Elizabeth Vogel.)

Q. Do you remember when the corporation was incorporated in November, November 1, 1946?

A. Yes.

Q. Did you have the stock issued in your name, as to your interest? A. Yes.

Q. And you still have that stock, do you not?

A. Yes.

Q. Do you maintain that that stock is yours, or not?

A. I will maintain that it is Les, Jr.'s from the beginning, and it is his now, as far as I am concerned.

Q. I am talking about your stock.

A. Yes.

Q. I am asking you if you maintain that your stock in your name is your own stock.

A. Yes.

Q. And what about Les, Jr.'s stock? That is in his name? A. Yes, that is his.

Q. Did you ever make any claim to the twin-screw cabin cruiser? Did you personally, as your own separate property, [131] make any claim to the cabin cruiser?

Mr. Resnik: I object, your Honor. It calls for an opinion and conclusion of the witness as to the nature of the property, which she hasn't been qualified to testify on.

The Court: Overruled.

A. Everybody kicks about the boat and——

Q. (By Mr. Calhoun): I am asking you to answer my question. Please answer my question. Did

(Testimony of Elizabeth Vogel.)

you make any claim personally as to the twin screw cabin cruiser? A. Yes.

Q. Do you claim that that cruiser was yours, or was that your husband's? Was that your husband's or yours? A. I think it's all of ours.

Q. You rode in it, but was it his or yours?

Mr. Resnik: I submit, the question has been asked and answered, your Honor. I object on that ground.

The Court: She may answer.

Q. (By Mr. Calhoun): Do you remember the stocks that you had in your name?

A. Yes. All the PG & E and——

Q. Those that we mentioned? A. Yes.

Q. As to the Anse Vista Apartment property, did you [132] negotiate with the builder or did your husband negotiate with him?

A. I did. He didn't want any part of it.

Q. Did you discuss that with your husband?

A. Yes, he told me I was crazy when I went ahead. I wanted to do it and I expected him in the future to go along with it, and if it wasn't for him passing on I would have had others.

About the boat, we have always had a boat.

Mr. Resnik: The witness has answered the question, your Honor, I submit.

Q. (By Mr. Calhoun): What was that you wanted to explain?

A. I wanted to say about the boat. You people don't care, even you say that is all right, but we have had a boat since we have been married, we

(Testimony of Elizabeth Vogel.)

have always had a boat hanging in the basement, and I don't see any reason at all that it shouldn't go along.

Mr. Calhoun: You may examine.

A. (Continuing): This is not something new, in a boat. We have always had one.

Cross Examination

Q. (By Mr. Resnik): Mrs. Vogel, did you ever have physical custody of the stock of the Vogel Chevrolet Company that was in your [133] name, prior to the death of your husband?

The Witness: What does he mean? I don't understand what that is.

Q. (By Mr. Resnik): Did you have physical possession of the stock certificates of the Vogel Chevrolet Company that stood in your name prior to the death of your husband?

A. I think so. I don't know what you mean. I don't know, I don't happen to be a business-woman. All I know is when I get the money in my hands.

Q. What did you do with the money when you got it in your hands? A. Pretty——

Q. What did you do with the money when it got in your hands?

A. Pretty much the way I wanted. If I wanted to give something away, I gave it. I gave my sisters and my father things, and I can spend it, as long as it's my money I can spend it the way I want.

Q. Wasn't most of the money that both you and

(Testimony of Elizabeth Vogel.)

your husband received from the business deposited in the bank accounts?

A. I spent it the way I wanted.

Q. Did you deposit any portion of the monies you received from the Vogel Chevrolet Company in the bank account? A. Yes. [134]

Q. Didn't your husband deposit the monies he received, the salaries he received?

A. I don't know what he did with his money. I never questioned him. As long as he gave me money to run the house, that is all I was interested in and that is the way, I never interfered.

Q. Don't you know that his salary checks were deposited either in the joint savings account or the joint checking account that you had with him at the bank?

A. The Marina, he had nothing to do with it. He had nothing to do with it. It was me that put his name on, I figured if anything happened to me or something like that, why, but it didn't make a bit of difference, he had a, I didn't even know he had a bank at Polk Street, I didn't know until afterwards. But he never used the Marina Branch.

Q. Didn't you draw a check on the joint checking account to make the payment on the Anse Vista property?

A. Well, that happened to be my account, so couldn't I do what I wanted——?

Q. It was a joint account, was it not?

A. It isn't a joint account. I put his name on it. He never used it.

(Testimony of Elizabeth Vogel.)

Q. He never drew any checks on the checking account? A. Not one. He never used it.

Mr. Calhoun: If your Honor please, the term "joint [135] account" has two meanings. I will object to a legal conclusion as to a joint account. I think we can say the name the way it stood, in the name of the party.

The Court: Your objection is overruled.

Mr. Calhoun: We have stipulated that this checking account stood in the name of Mrs. Les Vogel and Les Vogel.

Is that it?

The Witness: Yes.

A. (Continuing): Well, I was the one who opened the account. You can go to the bank and check it, but he never used the account.

Q. (By Mr. Resnik): Did you invest in any real estate prior to the Anse Vista Apartment House? A. (No response.)

The Court: Do you understand the question?

The Witness: No.

The Court: The question is very simple.

Read it, Mr. Reporter.

(Last question read.)

A. Anse Vista, no. But I did give money to my sister to pay some things. But it is in her name.

Mr. Resnik: I move that the last remark be stricken as non-responsive.

The Witness: Well, it has nothing to do with the [136] case.

The Court: It will be stricken.

(Testimony of Elizabeth Vogel.)

The Witness: If I want to give something away, I give it.

Mr. Resnik: I move that that remark be stricken and that the witness be instructed to answer the question.

The Court: It will be stricken.

Can you answer the question as it was put to you?

The Witness: Yes. Well, I gave some money to my sister to buy something.

The Court: It is not a question of giving something. It is a question of, did you invest in real estate?

The Witness: No.

Q. (By Mr. Resnik): How was the lot, the site selected, on which the Anse Vista Apartment House was constructed?

A. Arthur Hardy is a friend of ours, and I liked the lot, and I liked the view up there, and I talked him out of it. He was going to build a house for himself there, and I talked him out of it. After I bought it, why, he wanted to buy it back from me and I wouldn't let him. My husband told me if I wanted to invest in things, invest in business property. He kept telling me that, but——

Q. Mr. Hardy was a friend of the family?

A. Yes. [137]

Q. A friend of your husband?

A. An old friend for years.

Q. A friend of long years' standing?

A. Yes.

(Testimony of Elizabeth Vogel.)

Q. Of both you and your husband?

A. Yes.

Q. When you were questioned by Mr. Calhoun, you stated that if it wasn't for the death of your husband you would have had other properties. Can you explain how the death of your husband changed that?

A. Well, I wanted to have, go up the river and buy some places so we could, when we took the boat out, that we could get little places up the river and across the Bay, over at Belvedere, so we could have weekend places. And everybody says, "You shouldn't have a boat." We have always had a boat. Lots of people like nightclubs. Somebody else likes something else. And my husband went in with this man, he was partners with this man in the boat, and before that we always had smaller boats. And they say, "Oh, you shouldn't have it." Well, a lot of people have Cadillacs. We have never had a Cadillac. Les has a lot of used ones. Nobody thinks anything about a person having a Cadillac.

The Court: Don't volunteer anything. Answer the questions and not any more.

The Witness: Yes, your Honor. [138]

Q. (By Mr. Resnik): Do you recall a meeting that you had with Mr. Kubik, sitting at the counsel table at my right, such a meeting having taken place in the office of Mr. Jacobs in December of 1954?

A. Yes, and I will have to tell you—yes.

(Testimony of Elizabeth Vogel.)

Q. Do you recall that present at that meeting, in addition to yourself and Mr. Kubik——

A. Yes.

Q. (Continuing): ——was your son?

A. Yes.

Q. Les Vogel, Jr., and Mr. Jacobs?

A. No. Mr. Kubik came in there when I was at Jacobs' office alone. Les wasn't in there with him. And from there he went right out to the bank with me. That is the first time I met him. He wasn't in the office with Les, Jr. It was just Mr. Jacobs, I was in talking to Mr. Jacobs and Mr. Kubik came in. The three of us were there together.

Q. Do you recall that your son came in later after the discussion had gone on for a little while?

A. Yes.

Q. So that he was present during some part of it? A. Yes, that is right.

Q. Do you recall that at that time there was discussion between you and Mr. Kubik regarding the Anse Vista property? [139]

A. Yes. I know the other day you said Les said I talked too much about it. He always tells me I talk too much. He is telling me now to keep still.

Q. Do you recall at that time that you stated to Mr. Kubik that in addition to the property that appeared in the name of your husband, that that was reported on the estate tax return, that there was also this Anse Vista property that stood in your name, but notwithstanding that, it really was the property of you and your husband?

(Testimony of Elizabeth Vogel.)

A. If I said that—I wouldn't say it.

Q. I am asking you whether you said it.

A. I am sure I didn't. I think it was misconstrued.

Q. Do you recall that you said it not only on one occasion but more than one occasion, even after your son told you to keep quiet?

A. I don't think he said it for that. I was talking like I am doing now.

Q. I am asking you whether you recall——

A. I know he told me to keep quiet, but it wasn't for that.

Q. Do you recall telling Mr. Kubik about the Anse Vista property?

A. I don't know why I would. He had all the papers and everything there when he went out to the bank with me.

Q. He went out to the bank with you after he talked [140] with you at Mr. Jacobs' office, didn't he?

A. Yes. We went right out there and I handed him over everything.

Q. There was no reference to the Anse Vista property on the estate tax return, was there?

A. On the what?

Q. On the estate tax return of the Les Vogel estate.

A. It might have been on there, I don't know. But there is no reason why it should have been. They put everything down, didn't they? It should come off.

(Testimony of Elizabeth Vogel.)

The Court: Do you have considerable more cross examination?

Mr. Resnik: Yes, your Honor.

The Court: We will suspend at this time and call the calendar of the cases set for this afternoon.

The Clerk: Mrs. Vogel, you may take your seat. We are going to call other cases set for settlement stipulation.

The Witness: All right. Thank you.

(Whereupon, at 10:00 a.m. the hearing in the above-entitled matter was suspended until 10:15 a.m. of the same day.)

The Court: We will resume with the Vogel case. Mrs. Vogel, will you resume the stand.

Whereupon

ELIZABETH VOGEL

resumed her testimony as follows: [141]

Cross Examination—(Resumed)

Q. (By Mr. Resnik): Mrs. Vogel, I was asking you with reference to the meeting you had with Mr. Kubik at the office of your attorney Mr. Jacobs. At that time didn't you tell Mr. Kubik that the Anse Vista property in San Francisco stood in your name? A. Yes.

Q. Didn't you tell him at that time that, although the property stood in your name, it was really the property of both you and your late husband, you and Les Vogel, Sr.?

(Testimony of Elizabeth Vogel.)

A. No, I would say it was the whole family's, as far as I am concerned.

Q. Did you receive any money by gift or inheritance between 1940 and 1950?

A. '40? I don't know. Not then.

Q. You stated yesterday in reply to questions by Mr. Calhoun that among the items necessary in the household expense after your husband died was that spent for entertainment purposes. Do you recall that?

A. Well, no. I said it was for household use.

Q. And that you entertained at the house?

A. Yes.

Q. Because of—

A. I entertain a lot. But I did make a mistake yesterday when I said 14 rooms. You know, when the Japanese man [142] comes, he always 14 rooms. After I got home last night I thought it's eight rooms, with the bathrooms—and the bathrooms, but they put it down when they charge you.

Q. It is an eight-room house?

A. Yes. And they put it down.

Mr. Calhoun: You mean plus the bathrooms, that makes it fourteen, is that right?

Q. (By Mr. Resnik): You mean there are six bathrooms in the house?

A. Yes. Well, that is how they count, you know, doing a room or something. I am sorry, that is the way I said it. That is the way he puts it down on the paper. At the time I wasn't telling an untruth.

(Testimony of Elizabeth Vogel.)

The Court: Do you mean to tell us there are six bathrooms in the house?

The Witness: There are five bathrooms in the house. You see, what he includes is the garage, I guess, too.

Q. (By Mr. Resnik): So there are eight rooms and five bathrooms? A. Yes.

Q. And your son and daughter live with you at the house? A. At the time, yes.

Q. How soon after the death of your husband did you recommence entertaining?

A. Well, personal friends, personal friends right away. [143] We have a lot of very close friends.

Q. Didn't Mr. Kubic ask you at the interview we have previously identified how much it cost to run the house during the lifetime of Mr. Vogel and you said you didn't know how much it was?

A. No. I spend what I want.

Q. I show you, Mrs. Vogel, a packet of five checks marked Exhibit 11. I believe you stated that those were the checks that you received for family allowance.

A. Well, it was my money. Why shouldn't I? And I don't think Judge Fitzpatrick would have given it if——

The Court: Just a moment.

Mrs. Vogel, just answer the questions and don't volunteer your statements.

The Witness: All right, your Honor.

Q. (By Mr. Resnik): I have asked you whether

(Testimony of Elizabeth Vogel.)

you received these as the checks for your family allowance.

A. I don't know what I received these for, but I guess I got them. I will have to check them.

Q. You don't know?

A. I—was it for family allowance, all those?

Q. I asked you the question and you answered it, Mrs. Vogel. I have no information other than what you give us here in Court. [144]

The Witness: Can you see those, Mr. Calhoun?

Mr. Resnik: Your Honor——

The Court: Just a moment. Your lawyer is trying the case.

Q. (By Mr. Resnik): You were asked, Mrs. Vogel, by Mr. Calhoun with reference to certain stocks that were in your name. Do you know when there was purchased the Bank of America stock?

A. When I opened my accounts?

Q. Do you know how many shares you bought?

A. I don't know now. Here I have made a note. I have four shares of—what stock do you want? Four hundred sixty-seven of Bank of America.

Q. What are you referring to, Mrs. Vogel? You have a paper in your hand? A. Yes, here.

Q. What is that that you are referring to?

A. This here?

Q. Yes. What is that?

A. This is the ones I checked.

Q. No. What is the nature of the paper that you have before you?

A. This is my book, just a book I wrote on.

(Testimony of Elizabeth Vogel.)

Q. When did you make that entry of these stocks?

A. I wrote them down to see that I had them.

Q. When did you write it down?

A. When did I write these down?

Q. Yes.

A. Well, yesterday at noontime. I wrote them down then. It was on the list. We went over them.

Q. With whom?

A. With our attorney, Mr. Calhoun.

Mr. Calhoun: I will stipulate to that.

Mr. Resnik: The testimony of the witness is sufficient for my purposes.

Q. (By Mr. Resnik): From what source did you obtain the funds with which to make the payment for the Bank of America stock?

A. With money I saved.

Q. Was it in the checking account that you had?

A. I made, I paid the first down payment with a check from the bank, yes.

Q. From the checking account?

A. For the lot, first. Then I paid five times on it, and that is the way you can check, at the bank.

Q. Did you always pay by check?

A. Yes.

Q. That was your common practice in other respects also, to make various payments by check?

A. Not always. [146]

Q. Did you have a lot of cash around the house?

A. No.

(Testimony of Elizabeth Vogel.)

Q. Do you recall filling both federal and state income tax returns?

A. I let the business take care of that. I am not a business woman.

Q. You let who take care of that?

A. The what?

Q. I didn't hear your answer.

A. I let them take care of it. That is why they got——

Q. Who do you mean by "them"?

A. I write down everything. The business.

The Court: Can you answer the question? Who do you mean by "them"? Do you mean your attorney, your son or whom?

The Witness: I don't know.

Q. (By Mr. Resnik): It has been stipulated, Mrs. Vogel, in paragraph 3 of the stipulation, that there was a resolution contained in the corporate minutes of the Les Vogel Chevrolet Company that there was a resolution that the assets of the corporation be transferred to Les Vogel as of midnight December 31, 1942. Did you attend the meeting at which such resolution was passed?

A. I don't know.

Q. Do you know when that meeting took place?

A. Yes.

Q. When did the meeting take place?

A. Well, if you said it was in 1942, that is when it was.

Q. Did you ever receive any distributions from the business while it was a partnership?

(Testimony of Elizabeth Vogel.)

A. I don't know.

Q. Do you recall telling Mr. Kubik that you didn't believe that you received any?

A. I don't remember.

Mr. Resnik: I have no further questions at this time.

The Court: You may inquire.

Redirect Examination

Q. (By Mr. Calhoun): Mrs. Vogel, do you know what a distribution is? A. Yes.

Q. What is it?

A. Well, you get your share.

Q. Did you get your share—your share of what?

A. Share of Les Vogel Finance Company?

Q. No. I am talking about, do you know what a distribution is?

A. I don't worry about—I am not a business-woman.

Q. I am asking you, answer my question, do you know what a distribution is? A. Yes.

Q. What is it? Just to be sure we are talking about [148] the same thing, what is it?

A. I don't know what it is.

Q. You just said you did. I want to know whether you do or don't. Do you?

A. Assuming that—

Mr. Resnik: I submit that counsel is arguing with his own witness.

Mr. Calhoun: I am just asking to clarify.

The Witness: Yes.

(Testimony of Elizabeth Vogel.)

Q. (By Mr. Calhoun): Assuming a distribution means money, did you get money? A. Yes.

Mr. Resnik: I move that that answer be stricken.

The Witness: Then I will say it to you.

Mr. Resnik: It is obviously leading on its face.

Mr. Resnik: I move that be stricken as a volunteered statement.

The Court: Motion denied.

Q. (By Mr. Calhoun): So there is no confusion, the checks that counsel handed you, that this attorney over here handed you a little while ago, are the same checks that I gave you yesterday?

A. Yes.

Q. Are those the checks for your family allowance?

A. No, it was for, that was for, wasn't that for a share of—— [149]

Q. These checks that I showed you yesterday, do you remember, when we were discussing a family allowance? A. Yes.

Q. Did you receive a family allowance of \$1,500 a month? A. Yes.

Q. You got the money, didn't you?

A. Yes.

Q. You cashed the checks? A. Yes.

Q. Assuming that these are checks made out for the total of that amount, from the estate of Les Vogel, do you know whether or not those are the same checks you received?

A. Yes, they are.

(Testimony of Elizabeth Vogel.)

Mr. Resnik: I object, your Honor, as improper on its face.

The Witness: You said it was a family allowance——

Mr. Calhoun (interrupting): Keep quiet, Mrs. Vogel.

Mr. Resnik: I ask that the reporter read the question, starting with the word "Assuming."

Mr. Calhoun: I asked if she knew whether or not—I will ask to have the question read back.

The Court: What was the question?

(Last question read.)

The Court: The answer may stand. [150]

Q. (By Mr. Calhoun): Also for your living expenses during this period when you were receiving the family allowance did you buy any clothes?

A. Yes. I needed a lot of them.

Q. Did you buy any clothes in Texas?

A. Yes.

Q. What did you buy?

A. A couple of fur coats.

Q. What were they?

A. A couple of minks.

Q. What did they cost you, do you remember?

A. I don't know.

Q. Give you best estimate, if you have any idea.

A. About \$1,500 apiece, or \$1,800. I don't know.

Q. Where did you buy them?

A. Neiman & Marcus.

Mr. Calhoun: That is all.

(Testimony of Elizabeth Vogel.)

Recross Examination

Q. (By Mr. Resnik): When did you purchase the fur coats, Mrs. Vogel?

A. When we went to the Motor Car Dealers' Convention.

Q. When was that?

A. Well, 1951, wasn't it? Something like that, I think.

Q. What part of 1951?

A. Well—or it was the end of 1950, wasn't it? End of [151] 1950.

Q. What year did you purchase the fur coats, Mrs. Vogel? A. It was in 1950.

Q. How many did you purchase?

A. A couple of them.

Q. Were they the same? A. No, no.

Q. How many mink coats did you own prior to the death of your husband?

A. I had three. I gave them to my sister. She needed them. She didn't have any.

Q. When was the first of those three coats purchased? A. When was the first—what?

Q. When was the first of the three coats purchased, of the three coats that you had during the lifetime of your husband?

A. Oh, no, they weren't mink; they were something else.

Q. What were they?

A. One was seal.

Q. When was that purchased?

(Testimony of Elizabeth Vogel.)

A. Oh, years ago. You know, they last so long. You have them a lifetime.

Q. How much did you pay for it?

A. I forget.

Q. What was the other two coats?

A. These were years ago. [152]

Q. What were they, what type of fur?

A. I forget what you call them.

Q. How long prior to the death of your husband did you acquire the last one? A. Before?

Q. Yes.

A. Oh, about 10 years. They get pretty shabby in that time.

Q. I show you, Mrs. Vogel, Petitioner's Exhibit 11, a packet of five checks that have been handed you previously. Do you know what those checks were given to you for?

A. Yes, for the settling of the estate, I think it was. See?

Q. For your distributed share of the estate?

A. Yes.

Q. With whom did you attend the Motor Dealers' Convention in Texas?

A. With my daughter, my son and myself. We went away because—it was the same year my husband passed away.

Q. Do you know what month in that year your husband passed away?

A. Yes, I do. And I think the Motor Car Dealers was two months later, wasn't it? Something like that.

(Testimony of Elizabeth Vogel.)

Q. Did you pay all the expenses for that trip?

A. I don't remember. [153]

Mr. Resnik: I have no further questions at this time.

Mr. Calhoun: I have no further questions at this time.

The Court: You are excused.

(Witness excused.)

Mr. Calhoun: I would like to recall Mr. Vogel at this time.

J. LESLIE VOGEL, JR.

a witness recalled by and on behalf of the Petitioners, having been previously sworn, was examined and testified further as follows:

Redirect Examination

Q. (By Mr. Calhoun): Mr. Vogel, you have already been sworn and you are still under oath. You understand that, do you? A. Yes.

Q. I want to ask you what the attorney's fees were that were paid to Mr. Tevis Jacobs for the tax matter that he has handled for the estate, if you know.

Mr. Resnik: I object, your Honor. I don't believe it has any relevance or materiality to the issues. There is no issue raised in the pleadings.

Mr. Calhoun: This is subsequent. Attorney's fees are deductible, in the estate. [154]

The Court: Proceed.

Q. (By Mr. Calhoun): Do you know?

A. I paid him \$1,000.

(Testimony of J. Leslie Vogel, Jr.)

Q. How much has he been paid altogether?

A. Well, I think he got \$1,500 for, during the period of distribution and \$1,000 subsequently.

Q. He has received \$2,500 altogether, is that correct? A. Yes.

Q. And you have paid me a thousand dollars retainer in this case? A. Yes.

Q. Before I knew what I was getting into.

Do you recall the trip to the Motor Car Dealers' Convention that you took with your mother, which she has testified to? A. Yes, sir.

Q. When was that?

A. It was January 1951.

Q. Do you recall her buying the coats?

A. We were returning from the convention and stopped in Texas and she purchased them.

Mr. Calhoun: I have no further questions.

Recross Examination [155]

Q. (By Mr. Resnik): You have testified that you paid Tevis Jacobs \$1,000? A. Yes, sir.

Q. Was that of your own personal funds?

A. Yes.

Q. What was the basis of the payment, what services had he rendered or was he committed to render?

A. In an effort to bring about a settlement of this case, he told me that he had been working at great lengths and was entitled to additional compensation.

Q. Now, you say that you think a payment of

(Testimony of J. Leslie Vogel, Jr.)

\$1,500 had been made to him previously thereto. Do you have a check to show that payment?

A. No, sir.

Q. Do you know how that payment was made to him?

A. Isn't there a—I don't know.

Q. Do you know who made the payment to him?

A. Could it have been awarded by the Court?

Q. I don't know, Mr. Vogel.

A. I don't know.

Q. You don't know. So that you don't know about the \$1,500 payment at all? You just think that there might have been such a thing?

A. Yes, sir.

Q. As to the thousand-dollar payment to Mr. Calhoun, was that paid by check? [156]

A. Yes, sir.

Mr. Resnik: I have no further questions.

Further Redirect Examination

Q. (By Mr. Calhoun): Did you pay that on behalf of the estate or yourself or what, to me?

A. I advanced it on behalf of the estate.

Further Recross Examination

Q. (By Mr. Resnik): Do you know whether this estate is still open in the Probate Court?

A. It's been distributed, hasn't it?

Q. Closed? A. Yes.

Q. So you say, when you made the payment on behalf of the estate, what do you mean by that?

(Testimony of J. Leslie Vogel, Jr.)

A. I was drawing an assumption that this is part of the estate is why we are here. Maybe I am wrong in my assumption.

Q. From whom would you get reimbursement, if the distribution had been made?

A. The Crocker-Anglo Bank, my mother as the recipient of the distribution of the estate.

Q. Did your mother agree to reimburse you from the Crocker-Anglo Bank?

A. I didn't discuss it with her. [157]

Q. Did you discuss it with the Crocker-Anglo Bank?

A. I informed them we were going into Tax Court. They have my sister's trust, and while they have complete jurisdiction over it, they just counsel with me, and I think what they are doing is right. They are the absolute administrators of her trust, and they wanted to sell some stocks.

Mr. Resnik: I submit that the answer is non-responsive to the question.

The Witness: You asked me—well, all right.

Q. (By Mr. Resnik): Did the Crocker-Anglo Bank give you any money out of your sister's trust?

A. Nothing.

Mr. Resnik: I have no further questions at this time.

The Court: You are excused.

(Witness excused.)

Mr. Calhoun: Mr. Skinner.

Whereupon

VIRGIL G. SKINNER

a witness called by and on behalf of the Petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Virgil G. Skinner, 68 Post Street.

Direct Examination

Q. (By Mr. Calhoun): You are an attorney-at-law, are you not? A. Yes, sir.

Q. And you have handled the partnership incorporation affairs of the Les Vogel Chevrolet Company, is that right? A. Yes, sir.

Q. Is it true that Mr. Partridge and Mr. O'Connell have been the personal attorneys for Mr. Vogel?

A. Yes.

Q. Did you prepare the limited partnership agreement which was effective as of January 1, 1943? A. Both of them.

Q. And the general partnership agreement that followed that?

A. The second limited partnership agreement. There was no general partnership agreement.

Q. I mean the one where, I am sorry, where Les Vogel, Jr., became a general partner?

A. Yes.

Q. And did you discuss that matter with both Mr. and Mrs. Vogel, as to the separation of the interest of one-third to Les, Jr., Mr. Skinner?

Mr. Resnik: I object to that, your Honor. The question is leading on its face. If counsel wants to

(Testimony of Virgil G. Skinner.)

know what went on, he can ask what discussions were held and lay a [159] proper foundation for such.

The Court: The question was leading.

Q. (By Mr. Calhoun): Did you have discussions with anybody concerning the formation of this partnership? A. Yes.

Q. Who did you discuss the matter with?

A. Principally with Les Vogel.

Q. With anyone else at all?

A. I think that I explained the setup and what was being done to Mrs. Vogel, and I think also to Les, Jr.

Q. Did you prepare the incorporation of the company November 1, 1946? A. I did.

Q. Do you know of your own knowledge that the stock was issued three ways? A. I do.

Q. You are the secretary of the company?

A. I am.

Q. And you so are today? A. Still am.

Mr. Calhoun: No further questions.

Cross Examination

Q. (By Mr. Resnik): Mr. Skinner, you said you discussed the formation [160] of the limited partnership with Les Vogel, Jr. Do you recall that Les, Jr., was in the Army during that time?

A. I said I thought I did. I think I talked to him, not in detail, item by item of the contract, but in general what it was, at sometime when he was in San Francisco.

(Testimony of Virgil G. Skinner.)

Q. When did you have your discussion with Les Vogel that you referred to?

A. Latter part of 1942.

Q. Do you have with you the copies of the partnership agreements that you prepared?

A. I have here my office copy of the original certificate of limited partnership which was drawn at that time and signed, I believe, ultimately, I believe, in February of '43. I will say an original of that document is on file in the Office of the County Clerk in San Francisco, also of record in the Office of the County Recorder, San Francisco.

Q. Wasn't there a resolution sometime in 1942 leading to the dissolution of the Chevrolet Corporation at that time and the statement that all of the assets were to be distributed, that all the assets were to be transferred to Les Vogel?

A. Yes. I wrote that resolution up on the closing merely as a vehicle to carry through to the limited partnership.

Mr. Resnik: No further questions.

Redirect Examination

Q. (By Mr. Calhoun): Do you have an extra copy of that limited partnership agreement?

A. This is my office copy. There was also a copy of the amended certificate which was filed in 1945.

These two are the affidavits of publication on the certificate of fictitious name which accompanies those.

(Testimony of Virgil G. Skinner.)

Mr. Resnik: Is the reporter taking down what has been said?

The Reporter: Yes.

Mr. Resnik: I would like it read.

Mr. Calhoun: He said that——

Mr. Resnik (interrupting): I will have the reporter read it, please.

(Last question and answer read.)

Mr. Calhoun: I would like to have these marked for identification.

The Clerk: Petitioner's Exhibit 21 for identification.

(Petitioner's Exhibit No. 21 was marked for identification.)

The Clerk: A document headed "Les Vogel Chevrolet Company, Certificate of Limited Partnership".

Mr. Calhoun: I would like to attach this to that, all at once.

The Clerk: With an affidavit dated May 11, 1943, attached. [162]

The Court: Further questions?

Mr. Calhoun: I want to identify these and ask that they be received in evidence.

The Clerk: Petitioner's Exhibit 22 for identification, a document headed "Les Vogel Chevrolet Company, Amended Certificate of Limited Partnership," with affidavit dated October 24, 1945, attached.

(Petitioner's Exhibit No. 22 was marked for identification.)

Q. (By Mr. Calhoun): Handing you the Peti-

(Testimony of Virgil G. Skinner.)

tioner's Exhibit 21, is that the original copy of, original certificate of limited partnership and the affidavit?

A. It is my office copy of the certificate of limited partnership and the copy of the affidavit of publication which was furnished to me by the recorder.

Mr. Calhoun: I would like to offer that.

Mr. Resnik: I would like to ask the purpose of the offer, in view of the comprehensive stipulation which we have.

Mr. Calhoun: It shows in more detail how it was done and it is cumulative to show that it was consistent with the stipulation and shows the division into three separate parts verily clearly.

The Court: It will be received as Exhibit 21.

The Clerk: Petitioner's Exhibit 21 in evidence.

(Petitioner's Exhibit No. 21 was received in evidence.) [163]

Q. (By Mr. Calhoun): Handing you Petitioner's Exhibit 22 for identification, is this the amended certificate and the affidavit of publication of the amended certificate of limited partnership?

A. This is my office copy of the amended certificate of limited partnership which was filed, and also a copy of the affidavit of publication of the certificate furnished me by the recorder.

Mr. Calhoun: I offer this in evidence as Petitioner's Exhibit No. 22.

The Court: It will be received.

(Petitioner's Exhibit No. 22 was received in evidence.)

Mr. Calhoun: I have no further questions.

Mr. Resnik: I have no further questions.

The Court: You are excused.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Calhoun: I have no further witnesses.

The Court: Petitioner rests?

Mr. Calhoun: Petitioner rests.

Mr. Resnik: At this time, your Honor, the Respondent desires to offer photostatic copies of original papers which are on file in the probate proceedings of the estate of decedent J. Leslie Vogel. Such probate was held in the Superior Court in and for the City and County of San Francisco.

The first document we offer is the notice of election to take under the will, signed by the widow, Elizabeth S. Vogel.

The Court: Is there any objection to these?

Mr. Calhoun: No objection.

The Court: It will be received.

The Clerk: Respondent's Exhibit I in evidence.

The Court: It is received.

(Respondent's Exhibit I was marked for identification and was received in evidence.)

Mr. Resnik: As Respondent's Exhibit next in order, we offer this photocopy of petition for authority to sell shares of corporate stock, filed in the probate proceedings, signed by the executors of the estate, Elizabeth S. Vogel and Robert G. Partridge.

The Court: It will be marked Exhibit J, and it will be received in evidence.

(Respondent's Exhibit J was marked for identification and was received in evidence.)

Mr. Resnik: Respondent's next exhibit in order is the order of the Probate Court authorizing sale of shares pursuant to the petition, the previous exhibit.

The Court: It will be received as Exhibit K.

(Respondent's Exhibit K was marked for identification and was received in evidence.)

Mr. Resnik: Respondent at this time will call Mr. Kubik.

Whereupon

EMIL W. KUBIK

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Emil W. Kubik.

Direct Examination

Q. (By Mr. Resnik): Where do you reside, Mr. Kubik?

A. 1450 Lincoln Avenue, Burlingame.

Q. What is your present position, employment?

A. I am a reviewing officer for the Estate Tax Division, U. S. Internal Revenue.

Q. How long have you been an employee of the Internal Revenue Service? A. 18 years.

Q. During what portion of that time were you delegated to estate tax work?

(Testimony of Emil W. Kubik.)

A. The entire time, with the exception of the year last passed, which was devoted to field audit.

Q. You are the agent who examined the return filed in the estate of J. Leslie Vogel, the Petitioner?

A. I am. [166]

Q. Can you outline to us briefly what steps you took in the conduct of your investigation to determine the true estate tax liability of that estate?

A. Well, I reviewed the return as filed, which is the first step, and I checked the probate records, I checked the partnership incorporation book records, made inquiries of employees who, I presume, were informed as to necessary knowledge to determine the information I was seeking, as to the facts, particularly the characterization of the property interests. I also interviewed Mrs. Vogel for the purpose of establishing the true characterization of the interests, checked bank accounts to follow the application of the funds, deposit of funds and the application of funds, insofar as it was possible withdrawal therefrom, the application, insofar as it was possible, to make a determination.

Q. In the course of your investigation did you determine that certain property owned by the Vogels appeared in the name of the decedent alone and the other appeared in the name of Mrs. Vogel alone?

A. I did not know about any asset held by Mrs. Vogel alone until the meeting in Mr. Jacobs' office, at the time I was interviewing her, when she dis-

(Testimony of Emil W. Kubik.)

closed the Anse Vista Apartments, and then she disclosed the existence of other assets.

Q. Will you tell us, to the best of your recollection, when that meeting took place? [167]

A. Sometime in December 1954.

Q. And you say the meeting took place in the office of——? A. Tevis S. Jacobs.

Q. That is the Mr. Jacobs who is one of co-counsel in this case? A. Yes.

Q. Who were present at that meeting?

A. Initially there was Mr. Jacobs and Mrs. Vogel, they were there, Mrs. Vogel was in Mr. Jacobs' office as I entered, and then Mr. Vogel, Jr., came in subsequently, so there were present the four of us, Mrs. Vogel, Mr. Jacobs, Les Vogel, Jr., and myself.

Q. I believe you stated that at the time of that interview, in December of 1954, you were not aware of the fact that there were certain assets that appeared in the name of Mrs. Vogel alone and that she made some disclosure to you with reference to Anse Vista. Will you tell us what was said?

Mr. Calhoun: I object to that question as not exactly what he said. He said he didn't know of any assets standing in the name of Mrs. Vogel alone up until that time.

The Witness: That is incorrect. I will have to correct that. Because I did have knowledge of the Chevrolet Motor Company stock in the name of Mrs. Vogel.

Q. (By Mr. Resnik): You had knowledge of

(Testimony of Emil W. Kubik.)

the Chevrolet Motor Company stock that stood in Mrs. Vogel's name? [168]

A. I got that from the corporate records, yes.

Q. Then she made some disclosure as to the Anse Vista property? A. Yes.

Q. Will you tell us, as best as you can recall, where the conversation wherein she disclosed the existence of the Anse Vista property?

A. I believe I put the question to her, whether there were any assets in her name, and she said there was the Anse Vista Apartments. Then she was urged by her son to remain quiet. She said, "Well, it's Dad's." He said, "Keep quiet, Mother. You know you're talking too much." And she said, "It's all Dad's. You know it is." But he continued to urge her to keep quiet.

Q. After the statement with reference to the Anse Vista property what, if any, discussions were had in connection with any other properties that might have been in her name alone?

A. There was no discussion with regard to any other property, except that all-inclusive statement that was made, as I just stated.

Q. From what source did you ascertain that there were certain stocks in the name of Mrs. Vogel alone?

A. After we adjourned the meeting in Mr. Tevis Jacobs' office Mrs. Vogel and her son and I went to the Marina Avenue Branch of the Bank of America and Mrs. Vogel got her safety [169] deposit box and we made an inventory of the con-

(Testimony of Emil W. Kubik.)

tents of those assets in her name that bore the——

Mr. Calhoun: Are you reading something?

Mr. Resnik: No.

The Witness: I have it here for reference, if necessary.

Mr. Resnik: Would you prefer we remove the papers?

Mr. Calhoun: No, no, no. I didn't know whether he was or not. I just wanted to know. That is all right.

A. (Continuing) We made an inventory of the contents with regard to those securities that were acquired prior to the death of the decedent, Leslie Vogel.

Q. (By Mr. Resnik): Did you have any discussion with the parties present at that time as to the nature of the securities that were being inventoried?

A. Nothing of any material nature that I recall, just general conversation.

Q. Did you have any discussion with Mrs. Vogel as to the general nature of the property that was owned by her and her husband, irrespective of the names in which the individual assets might have been set up?

A. She couldn't recall, she said she didn't know, "It belonged to both of us, it was our property."

Q. She said whatever property they had "belonged to [170] both of us, it was our property"?

A. Yes.

Q. Is that correct? A. That is correct.

(Testimony of Emil W. Kubik.)

Q. How long did the interview with Mrs. Vogel and Les Vogel, Jr., take, in the office of Mr. Jacobs.

A. I would say about an hour.

Q. Thereafter, did you then seek an interview with the other co-executor, Mr. Partridge?

A. That is true, I did.

Q. Can you tell us when and where you met with Mr. Partridge?

A. I called on him at his office, I made a phone call to him, making an appointment, since he was co-executor, to get some information with respect to what seemed to be confusion to me as to the true characterization of the property.

Q. Where did the first, if there was more than one, where did the first meeting take place?

A. January 14, 1955.

Q. Where? A. In his office.

Q. Was there more than one meeting?

A. There was another.

Q. When was that? A. January 18, 1955.

Q. And where was that held?

A. In his office.

Q. Can you tell us, as best as you can, the nature, the content of the discussions that you had with Mr. Partridge on each of those days? That is, can you tell us as to what you said and as to what he said?

Mr. Calhoun: What day, first?

Q. (By Mr. Resnik): If you can segregate them between the two dates, then give us the conversations held on January 14 first.

(Testimony of Emil W. Kubik.)

A. I don't believe I can segregate them without referring to any notes.

Q. Can you recollect?

A. It would be context of both collectively.

Q. You can recollect the context of both the conversations collectively? A. That is correct.

Q. Can you tell us, as best you can recall, the conversation, what was said at those meetings?

A. Mr. Partridge said he had no knowledge of the existence of any agreement with regard to the transmutation of property. I queried him with respect to the terminology in a probated will in regard to community property as declared by the testator, and he said that was his own language; that, however, it was based on information disclosed by him to the [172] testator; that the plan of the testator was to make an equal division for the three survivors, his wife and his two children.

Q. Did you have any discussion with Mr. Partridge with reference to family allowance?

A. I did not.

Q. Did you have any discussion with reference to the family allowance matter at the interview held with Mrs. Vogel in Mr. Jacobs' office?

A. Only to ask her the extent of her household expenses, to ascertain the standard of pattern they had been enjoying in the immediate recent past, and she replied she didn't know.

Q. In connection with the audit of the return and in the determination of the deficiency here in question, there was a disallowance of part of the

(Testimony of Emil W. Kubik.)

family allowance claimed based upon your report. Will you please explain to us briefly, yet as fully as you can, the basis upon which you made the determination that family allowances should be in the amount of \$1,000 a month for 18 months?

A. Well, in examining the various bank accounts and ledger records, several savings accounts and the checking account, those items that were substantial comparatively, such as a thousand, 15 hundred, 5 thousand, I presumed, were for inter-transfer between accounts or for investment purposes, and those debit items, there is no way of identifying it because it was just a debit item appearing on the ledger record, I [173] presumed were for living costs and I took the cumulative total of those items in annual periods and they ran some less than 6 or 7 thousand dollars a year. So, allowing for possibly cash disbursements, I concluded that their living costs would be no more than \$1,000 a month, probably less.

Q. Your analysis was based upon the living costs of the family as a whole, that is?

A. That is correct.

Q. Whoever occupied the household at the time?

A. I don't know about how the funds were applied. I took the cumulative total of the debit items appearing in the bank account and made a liberal allowance for any cash disbursements.

Mr. Resnik: I have no further questions at this time.

(Testimony of Emil W. Kubik.)

The Court: You may cross-examine.

Cross Examination

Q. (By Mr. Calhoun): When you discussed with Mr. Partridge with regard to no knowledge of any agreement as to transmutation of property, you were discussing a written agreement, were you not? A. That is correct.

Q. Did he tell you about the proposed will that he had prepared? A. Yes, he did.

Q. He went over that, saying that he thought he had [174] separated the property?

A. No, he made no inference that there had been any separation that had been consummated as yet.

Q. You mentioned that he discussed——

Mr. Calhoun: Well, that I move be stricken as a conclusion of the witness, as to its not being consummated as yet.

Q. (By Mr. Calhoun): I am talking about your conversations with him.

A. My conversation with Mr. Partridge was to develop whether or not there had been a natural transmutation. He said he had no knowledge of any agreement thereof. He showed me a copy of his unexecuted will.

Q. You are talking about a copy of the unexecuted will; that refers to a written agreement, does it not?

A. That is correct. He had no knowledge of it.

Q. That is what I am asking you. He had no knowledge of any written agreement?

(Testimony of Emil W. Kubik.)

A. That is right.

Q. He didn't say anything about any other agreement? A. That is correct.

Q. Written agreement, we are discussing; when you said "written agreement" he said "written agreement"?

A. Well, he didn't say there was any oral agreement, either. [175]

Q. Did you see the note he had here, introduced, about transmutation of——? A. 1943?

Q. Yes. A. I did not.

Q. Did you see his notes?

A. I didn't ask to see his notes.

Q. Did you see them? A. No.

Q. Didn't you think at the time they had some material bearing?

A. I thought about it, I thought I could rely on his knowledge, that he knew what he was doing.

Q. When did you discuss this with him?

A. January 1955.

Q. And when the will was signed was 10 years before that, wasn't it, isn't that true?

A. That is correct.

Q. 1946, almost 10 years?

A. But he was also co-executor, and he seemed to be familiar with the family affairs.

Q. That is true. You knew, however, at the time, you wanted to correct yourself on that matter, you knew that the Les Vogel Chevrolet stock was divided three ways, didn't you? A. Oh, yes.

(Testimony of Emil W. Kubik.)

Q. You knew that all the time?

A. I would say that the stock certificates were in separate names.

Q. That is what I mean. A. Yes.

Q. Did you inquire into the matter of the limited partnership before, where it showed each one had a one-third interest? Did you go into that phase of it?

A. I discussed it with Mr. Skinner, yes.

Q. You didn't discuss with Mrs. Vogel and use that word "transmutation agreement" when you were discussing with her, did you?

A. No. But I discussed joint tenancy, community property and separate property with Mrs. Vogel.

Q. Did you define what "joint tenancy" was before you discussed it with her?

A. No, I did not. But I asked her did any change in her property holdings take place, and she said she couldn't recall, "Everything Les did he did for me."

Q. Did you discuss what "community property" meant when you discussed it with her?

A. I did not.

Q. But I am sure you drew the conclusion that she is not too well versed in legal matters and phraseology?

Mr. Resnik: I think that is an improper question. [177] It is not a matter of what Mr. Kubik thinks of Mrs. Vogel.

The Court: Are you objecting?

(Testimony of Emil W. Kubik.)

Mr. Resnik: I am objecting, yes.

The Court: Objection sustained.

Q. (By Mr. Calhoun): When you went over the bank deposits and the bank accounts and the application of funds, checking the family allowance, did you run into the item of the two fur coats?

A. Was that subsequent to death?

Q. That was subsequent to death, January 1951, and the date of the death of the decedent was August 16, 1950. This was January 1951.

A. I merely checked the records up to the date of death, because I was concerned with establishing the standards which they enjoyed. So I checked nothing after August 16, 1950.

Q. Did you ask her at that time whether she had had any fur coats before? A. I did not.

Q. Did you know that in addition to this family allowance she received a widow's salary from the business for sometime after his death?

A. I saw a copy, some reference to a resolution that the decedent's monthly salary was to continue to be paid to the widow. [178]

Q. You satisfied yourself she actually received the sum, though——?

A. I did not. I wasn't interested in it.

Q. In the widow's allowance?

A. In the widow's allowance?

Q. Yes, that is what I mean.

A. I may have asked counsel if it was paid. Mr. Jacobs told me it had been. That was enough for me.

(Testimony of Emil W. Kubik.)

Q. At the time you were discussing this matter with Mrs. Vogel was she making her answers responsive to your questions, did she answer responsively to every question you propounded to her?

A. I would say she did. And if she didn't know, she said, "I don't recall," or "I don't know."

Q. But my question to you is, did she answer every question that you asked her with an answer that was responsive to your question?

A. I wouldn't say entirely so, no.

Q. Did she volunteer a lot of things and talk about everything else except the point you were discussing?

A. Well, the Anse Vista was one of voluntary disclosure, but——

Q. I am talking about other things she was talking about. Did she sort of ramble like she did here in the courtroom? A. Somewhat. [179]

Mr. Resnik: That is a conclusion of counsel. The Court heard the witness and can determine how her answers were. I will object to the question.

Mr. Calhoun: I will put it this way:

Q. (By Mr. Calhoun): You were here when she was talking? A. Yes.

Q. And you were here when the Court instructed her to answer the questions? A. Yes.

Q. Did you have the same difficulty yourself?

A. Not to the same degree, not nearly to the same degree, but somewhat, yes.

Q. Every question you asked her, were you sure she understood it?

(Testimony of Emil W. Kubik.)

A. I gathered from her response she had.

Mr. Calhoun: I have nothing further.

Redirect Examination

Q. (By Mr. Resnik): During the course of your meeting with Mrs. Vogel was Mr. Jacobs, her attorney, present at all times?

A. Except when we were out to the Marina Avenue Branch of the Bank of America.

Q. I am talking about the time you were in his office.

A. In his office? He may have stepped out on occasion [180] for a few moments.

Q. But during the substantial part of the hour that you were there he was present?

A. He was.

Q. And he heard the questions that you put to Mrs. Vogel? A. Yes, he did.

Q. Did she discuss any of the matters with him at that time?

A. No. But when I asked her about the community property, joint tenancy, separate property, why, he asked her not to answer the question.

Q. Notwithstanding his admonition, did she answer the question?

A. She did not answer the question.

Q. Didn't you testify earlier she said whatever property they had they owned together, something to that effect?

A. That was along some other line of questioning, particularly in regard to the income tax re-

(Testimony of Emil W. Kubik.)

turns, where I was trying to get some explanation of why it was reported as community income on the income tax returns.

Q. What did she say?

A. She said, "Well, it is both our money," and that he handled all business affairs.

Q. You had two meetings with Mr. Partidge, one of the co-executors of the estate? [181]

A. Yes.

Q. Did you make clear to him the purpose of your visits to him?

A. I think he understood. I made clear to him I was trying to establish the true characterization of the property, whether it was community or separate, because there was marital deduction involved.

Q. You had one meeting on the 14th of January and then you returned again on the 18th?

A. That is correct.

Q. Was there any reason for your returning on the 18th? A. That is correct.

Q. Was there any reason for your returning on the 18th?

A. Other than something must have developed through an interview with Mr. Skinner or some other source, that I thought perhaps Mr. Partridge could throw some light on it.

Mr. Resnik: I have no further questions at this time.

Mr. Calhoun: That is all.

The Court: You are excused.

Mr. Resnik: If your Honor please, in light of

the nature of the proof or absence thereof in the record as to the family allowance, there being no evidence now in the record as to its payment, since Mrs. Vogel was not able to identify certain checks that were put before her, I would ask leave of the Court for permission to file an amendment to our [182] answer, in due course, disallowing the amount of family allowance that we did grant in the statutory notice and pray for the increased deficiency that would result.

The Court: Have you anything to say?

Mr. Calhoun: If that is the case, I would like to re-open and call Mr. Partridge back here to identify these checks, that these checks were issued by the estate and paid to her, that is her signature on them, and that is exactly what they were.

I can do it, if you want to go ahead and do it.

The Court: The testimony was quite correct yesterday.

Mr. Calhoun: It was, and——

The Court: I take it, it's just a question of the Court's determination of how far to believe or disbelieve the testimony.

Mr. Calhoun: I am in possession of a, I make an offer to show she received that money as the family allowance, that is what it was for. I can show it. If you want me to do it, I will go ahead and do it. It will take us awhile.

Mr. Resnik: If your Honor please, I am not satisfied with the state of the record, in light of

the replies that were given to me on at least two occasions by the witness.

The Court: Did you wish to have Mr. Partridge recalled?

Mr. Calhoun: He probably can't get here before noon. [183] I would like to have him called, however.

The Court: If you wish to call him, you may have that privilege. Do you think he can add anything to the testimony that has already been given?

Mr. Calhoun: It further shows, if your Honor please, on the final report of the Court and so forth, that she did receive this family allowance, it was paid to her. I am just trying to save time. I think that counsel is quibbling over this item, on the state of the record.

If you will concede those are paid to that—otherwise I will have to bring the accounting in for the Court, to find out, to prove it.

Without any prejudice as to whether it is reasonable or not, we contend that this was actually the amount paid to her, according to the Court's order.

Mr. Resnik: I can only go this far, your Honor, I can only stipulate that there does appear on the Petitioner's Exhibit No. 19——

The Court: All of those checks are divisible by 1,500, are in the amount of 1,500 or are divisible by 1,500?

Mr. Resnik: None of the checks are in the amount of 1,500; all are in other amounts.

Mr. Calhoun: When they were short of money.

Mr. Resnik: We can stipulate that there does appear in Petitioner's Exhibit 19 a reference under the legend "Cr", [184] which is taken to mean "Credit", which was paid, which appears as follows: "Said administrators hereby credit themselves with disbursements as follows"— a number of them appear, among which appears "Elizabeth S. Vogel, widow, per order of Court for family allowance, \$27,000." We will stipulate that that does appear in Exhibit 1.

The Court: How much do those checks total?

Mr. Resnik: The checks total \$27,000, I am advised by Mr. Kubik. And I would stipulate that, of course, your Honor.

The Court: I don't think it is necessary to bring in Mr. Partridge.

Are you still pressing your motion?

Mr. Resnik: Yes, I would say that, whether my stipulation is sufficient for the Court to find the actual amount of payment is a determination for the Court to make, I would still ask leave for permission to file an amendment to answer in due course. Perhaps after I have had an opportunity to review the transcript in the matter I may not press it, but at this time I wouldn't want to be precluded from doing so, if I should find that I should.

The Court: Of course, under the statute, he has the privilege of making a claim for increased deficiency at any time during the hearing or rehearing, and I would grant permission for that purpose.

Mr. Calhoun: Are you through?

Mr. Resnik: Yes, your Honor.

Mr. Calhoun: I have just a little rebuttal.

Would you take the stand, Mr. Vogel, again briefly?

Whereupon

J. LESLIE VOGEL, JR.

a witness called in rebuttal by and on behalf of the Petitioners, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Calhoun): To clear up the state of the record at the present time, Mr. Vogel, were you present at this conversation mentioned by Mr. Kubik and your mother? A. Yes, sir.

Q. You were present? A. Yes.

Q. Do you recall the discussion or a remark that you made telling your mother she talked too much?

A. Along that line.

Q. What was that occasion?

A. Well, I don't recall what the question was or what her answer was. If Mr. Kubik has information of what he asked her and what her answer was, I——

Q. I mean by that, did you have, were there a series of [186] questions being asked her at that time? A. Yes, there was.

Q. I will ask you whether or not her answers were responsive to the questions.

Mr. Resnik: I object, your Honor. It calls for an opinion and conclusion of the witness.

The Court: He may answer.

(Testimony of J. Leslie Vogel, Jr.)

A. I don't think that they were.

Q. (By Mr. Calhoun): Do you recall why you made that statement? A. Well,—

Mr. Resnik: I submit, your Honor, the question has been asked and answered, the witness' memory has been probed, and I object to its being asked again.

The Court: Overruled.

A. My mother's interpretation of the law is such that "Well, this was all ours. If I were to die, it would go to him; if he were to die, it would go to me." She doesn't understand what property standing in her name means to her.

Mr. Resnik: I move that the answer be stricken as not responsive to the question.

The Court: The answer will be stricken.

Q. (By Mr. Calhoun): I am asking you why you said that, if you know.

A. She made the statement that "It was Dad's." It was [187] not his. That is referring to the Anse Vista property.

Q. And you made that remark, is that right?

A. Yes.

Cross Examination

Q. (By Mr. Resnik): You said that you thought your mother's answers to some of the questions were not responsive? A. That is right.

Q. You just testified to that?

A. What does "responsive" mean in this instance?

(Testimony of J. Leslie Vogel, Jr.)

Q. I don't know. The question was asked of you and you answered it. What do you think it means?

A. That the proper answer is not being given.

Q. What do you mean by "proper", proper as you give it or proper as the one who is answering gives it?

A. No. Going around in a circle to answer.

Q. What question was asked by Mr. Kubik and what answer was given by your mother that you now think was not responsive?

A. I do not know what the question Mr. Kubik asked was. I remember that there was a question asked, but what the question was I don't recall.

Q. So now you are saying that her answer to one question may not have been responsive?

A. To many of them, that I heard.

Q. What was one of those questions that Mr. Kubik asked? [188]

A. I can't remember the question.

Q. How do you remember her answer, then?

A. I remember a generality of an answer that was coming out in almost every question that was asked.

Q. What was that generality of an answer that came out?

A. That "This is ours, Dad's and mine."

Q. How many times did she say that?

A. I wouldn't know.

Q. Did she say it more than once?

A. It's possible.

(Testimony of J. Leslie Vogel, Jr.)

Q. Do you know what question was asked when she said, "It's Dad's and mine"? A. No.

Q. So that that answer might have been responsive to the question, because you don't know what the question is?

A. You made the statement yesterday. I didn't.

Q. I am not making any statement. You testified in responsive to a question from Mr. Calhoun that you thought her answers were not responsive. I now ask you, what were the questions that were put by Mr. Kubik and what were the——?

The Court: He has answered that several times. He said that he doesn't know.

Q. (By Mr. Resnik): How long did the interview take?

A. I wasn't there at the start, so I don't know.

Q. How long did it continue after you appeared?

A. Possibly 15 to 20 minutes.

Q. Did your mother tell you what had transpired prior to your arrival? A. No.

Q. Did Mr. Jacobs tell you what had transpired prior to your arrival? A. I don't recall.

Mr. Resnik: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Calhoun): Do you know of your own knowledge whether or not your mother received the \$27,000 family allowance?

A. What?

Q. Do you know of your own knowledge whether

(Testimony of J. Leslie Vogel, Jr.)

or not she received \$27,000 family allowance from the estate? A. Did she receive checks——?

Mr. Resnik: If you don't know——

A. (Continuing) ——Did she receive checks to that amount?

Q. (By Mr. Calhoun): Yes. A. Yes.

Mr. Calhoun: No further questions.

Recross Examination

Q. (By Mr. Resnik): You say your mother received checks of \$27,000 from the estate. Did you disburse those checks?

A. I never had my hands on them.

Q. Do you know what the purpose of the disbursements was?

Mr. Calhoun: What disbursements are you referring to?

Mr. Resnik: Of these checks.

Mr. Calhoun: By the estate or by him?

Mr. Resnik: By the estate. He testified that he, of his own knowledge, knows what these disbursements were for.

A. I haven't seen the checks in quite awhile, but a letter did accompany them from Mr. Partridge's office.

Q. Do you open your mother's mail?

A. I read these letters.

Q. What was the substance of the mail, the letter that accompanied the checks?

A. I would say, I don't know the amount, it might have been 10 or 12 or 13 thousand dollars, the first check. It was on the basis of \$1,500 a

(Testimony of J. Leslie Vogel, Jr.)

month and was issued when there were funds available to the administrators of the estate to pay her the widow's allowance.

Mr. Resnik: At this time I move, your Honor, that that answer be stricken and the other answers given by Mr. Vogel as to his knowledge of the source and purpose of these payments be stricken, because it is apparent from his answer that he had no knowledge of his own on these matters, that his knowledge [191] is clearly hearsay, at best from the reading of a letter.

The Court: The motion is denied.

Q. (By Mr. Resnik): So whatever knowledge you had derived itself from reading a letter?

A. Yes.

Q. You had no knowledge of your own, as a participant in the distribution of the funds that are here being talked about?

A. I don't know what point you are trying to get at.

Q. You testified that you knew of your knowledge, your own knowledge, that the checks we have been talking about were disbursed to your mother for family allowance?

A. That was my understanding, yes.

Q. Your understanding based upon what?

A. The reading of the award of the Superior Court, giving my mother an allowance while the estate was being probated or in probate.

Q. What did you read, from the Superior Court, did you say?

(Testimony of J. Leslie Vogel, Jr.)

A. I didn't—I said the award from the Superior Court giving her \$1,500 a month allowance while the probate was, while the—I don't know the words—while the estate was being, was in probate.

Q. Where did you get your information as to the award [192] by the Probate Court?

A. I was told about it probably by Mr. Partridge or Mr. O'Connell or Mr. Skinner.

Q. You had no knowledge other than that that was communicated to you secondhand as to the fact that your mother was receiving——

The Court: How do you get knowledge? What is the use of picking at words like that?

Mr. Resnik: If your Honor please—I submit, your Honor, that knowledge based upon hearsay is not the kind of knowledge that permits a witness to testify in this Court. It is hearsay to him as to what these expenditures were for, and if they seek to predicate a finding upon that, it is based upon hearsay evidence that should properly have been excluded, as my motion——

The Court: That is not my understanding.

Further questions?

Mr. Calhoun: I have no further questions.

The Court: You are excused.

(Witness excused.)

Mr. Resnik: I will recall Mr. Kubik to the stand.

Whereupon

EMIL W. KUBIK

a witness called on rebuttal by the Respondent, having been previously sworn, was examined and testified further as follows: [193]

Direct Examination

Q. (By Mr. Resnik): Mr. Kubik, I want to pursue just one small matter with you. Directing your attention to the conversations you had with Mrs. Vogel at the office of Mr. Jacobs and at the time that her son, Les Vogel, Jr., was present, you testified that during the course of your meeting Mr. Vogel, Jr., stated to his mother not to speak further or to keep quiet or words to that effect. Do you recall your testimony in that regard?

A. I do.

Q. Can you restate for us the circumstances under which such remark or remarks were made by Mr. Les Vogel, Jr.?

Mr. Calhoun: That has already been testified to.

Mr. Resnik: If your Honor please, they sought to impeach him by rebuttal testimony. I have sur-rebuttal here.

The Court: You may answer.

A. I asked Mrs. Vogel if she knew the difference between joint tenancy, separate property and community property, and any assets in their respective names. She said, she made reference to the Anse Vista Apartment House, and Mr. Vogel, Jr., here said, "Be quiet, Mother. You are talking too much." And she said, "Well, it was Dad's, you

(Testimony of Emil W. Kubik.)

know, it was all Dad's." And he said, "Be quiet, Mother. You're talking too much."

Q. That is your best recollection, now, the only time during the conversation when Mr. Vogel interjected remarks of [194] that or a similar vein?

A. He may have interjected other remarks, but those were the only ones I recall that were material for my purpose, and I recalled it.

Mr. Resnik: I have no further questions.

Cross Examination

Q. (By Mr. Calhoun): I understand you said you asked her if she knew the difference between joint tenancy, community property and separate property, and what was her answer to that?

A. And assets in their respective names.

Q. And did she say she knew the difference?

A. She said, "Well, there is the Anse Vista Apartment," she said, "That was Dad's."

Q. Did she answer your question?

A. I wouldn't say in full, but in regard to assets in respective names, in part, yes.

Q. Did you pursue the question further, if she knew the difference between joint tenancy, separate property and community property?

A. I did, and Mr. Jacobs told her not to answer the question.

Q. Did she answer any of that question for you?

A. Ultimately, no

Mr. Calhoun: That is all. [195]

Mr. Resnik: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Do you have further witnesses?

Mr. Resnik: We have no further witnesses, your Honor. We will submit our case.

Mr. Calhoun: We have no further evidence.

The Court: How much time do you need for briefs?

Mr. Resnik: In view of the fact that there are lengthy briefs to be copied, I would appreciate the Court's giving us more time than that permitted by the rules.

The Court: Would you prefer *ad seriatim* briefs or simultaneous briefs?

Mr. Resnik: *Ad seriatim* briefs, in view of the fact that I am not aware of what the Petitioners' contentions fully are.

The Court: Forty-five days for the Petitioners and 30 days thereafter for the Government's reply.

Mr. Resnik: May I respectfully request that we have 45 days, in view of the fact that we must submit our briefs to Washington after the 30 days?

The Court: Forty-five.

The case will be submitted on the record as made. The Clerk will announce your brief dates.

Court will be in recess until Monday morning at [196] 10 o'clock.

The Clerk: Petitioners' original brief is due August 6.

Respondent's answering brief — I don't want to give you a Sunday—September 20.

Mr. Calhoun: That means it has to be where?

The Clerk: Washington, D. C.

Petitioner's reply brief is due on October 21.

(Whereupon, at 11:45 o'clock a.m., Friday, June 21, 1957, the hearing in the above-entitled matter was closed.) [197]

[Endorsed]: T.C.U.S. Filed July 9, 1957.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Court Room No. 2, Internal Revenue Building, Washington, D. C., Wednesday, August 6, 1958.

(Met, pursuant to notice, at 1:30 o'clock a.m.)

Before: Hon. Ernest H. Van Fossan, Judge.

Appearances: Robert E. Whitley, Esq., (Hon. Nelson P. Rose, Chief Counsel, Internal Revenue Service), 5000 Internal Revenue Building, Washington, D. C., appearing for Respondent.

Proceedings

The Clerk: Docket 57535, the Estate of J. Leslie Vogel.

Mr. Whitley: My apologies for being a little late.

The Court: Did you wish to see the taxpayer's file?

Mr. Whitley: Yes.

The Court: This matter is before us on Petitioner's objection to computation of the Respondent under Rule 50. Will you state your position, Mr. Whitley.

Mr. Whitley: Respondent's position is, your Honor, that the objections raised; namely—I mean the objections raised relate to adjustments for attorneys fees paid after the filing of the petition in this case and adjusted for funeral expenses to the extent of one-half—alleged to be one-half—by the Petitioner's counsel.

The adjustment with respect to attorneys fees, Respondent shows there has been no proof offered as to the payment of that, and it is merely referred to as a payment, or it hasn't been shown whether the payment was by the estate or by the individual.

If the payment had been made by the estate, it would then be the subject of a deduction for such expenses. But here it is not shown whether the payment of \$1,000 was made by the estate or by the individual. His name is in the record.

The Court: Is it alleged in the petition?

Mr. Whitley: Not that I know of. I don't think so. I don't have a copy of the petition before me. The field office sent me no files on it, other than just a copy of this computation.

The next one, on the question of funeral expenses, the record is completely void of any mention of adjustment or allowance of that sum or any sum.

The Court: That grows out of the community property law?

Mr. Whitley: It does, but this is a brand new issue, as far as I can tell from the record. You just don't come in and allow funeral expenses whether they have been mentioned or not. They haven't been claimed in the petition, and no proof

was offered of them. At least that is the information that the trial attorney gives me.

This adjustment, then, trial attorney tells me that the deduction relating to funeral expenses, "No issue on that matter was raised, and it is difficult to ascertain what Petitioners seek to make. In the absence of an issue raised and deleted, the apparent authority upon which Petitioner relies——."

"In any event, the apparent authority upon which Petitioners rely is the Estate of Lee (1948 11 TC 141)."

That, we contend, is clearly distinguished from the attorneys fees in controversy here.

It is the position of the Government that no proof has been offered and no issue was actually made in the pleadings with respect to these two adjustments. They are, in fact, new issues coming before the Court, under Rule 50, which is prohibited.

The Court: In the petition of this case three errors are alleged. First is the determination by the Commissioner that the assets of decedent standing in his name were not his separate property, but were together with assets standing in the name of Elizabeth S. Vogel, his widow, under community property.

Second, the determination by the Commissioner that the sum of \$1500 per month for the support of the widow for a period of 18 months during administration of the estate was excessive, and that no more than \$1,000 per month for said period of time was allowable deduction.

And third, the determination by the Commissioner that the cost of maintenance and upkeep of a boat owned by the estate was not an allowable deduction.

As to those issues, Petitioner did not press Issue 3, but conceded it was not allowable.

It appears that the attorney fees paid Petitioner's counsel were not made the subject of assignment of error. They are not in the case.

Funeral expenses deducted to the extent of one-half fall under the community property law of California.

An order will be entered approving the Commissioner's computation.

(Whereupon, at 1:45 p.m., the Court adjourned.)

[Endorsed]: T.C.U.S. Filed August 14, 1958.

[Endorsed]: No. 16304. United States Court of Appeals for the Ninth Circuit. Estate of J. Leslie Vogel, Robert G. Partridge and Elizabeth S. Vogel, Executors, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: December 23, 1958.

Docketed: December 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

Docket No. 16304

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors, Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PETITIONERS
ON REVIEW

The Petitioners on Review hereby adopt their Petition for Review and Designation of Contents of Record on Review, documents Nos. 12 and 14, respectively, heretofore filed with the Tax Court of the United States and transmitted to this court as a portion of the record on review as Petitioners' on Review Statement of Points and Designation of Record in compliance with Rule 17 (6) of this Court.

/s/ GRANT G. CALHOUN,
Counsel for Petitioners on
Review.

Notice of Mailing Attached.

[Endorsed]: Filed January 9, 1959. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
RECORD TO BE PRINTED

In addition to the parts of the record designated for printing by the petitioners in the above-entitled case, respondent designates the following documents as material to the consideration of this appeal:

No. 4, Stipulation of Facts, filed June 20, 1957.

No. 8, Respondent's Computation for Entry of Decision, filed June 24, 1958.

No. 9, Petitioner's Objection to Computation of Respondent Under Rule 50.

No. 10, Official Report of Proceedings before the Tax Court, August 6, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Counsel for Respondent.

[Endorsed]: Filed January 19, 1959. Paul P. O'Brien, Clerk.

No. 16,304

IN THE

United States Court of Appeals
For the Ninth Circuit

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

BRIEF FOR PETITIONERS.

GRANT G. CALHOUN,
1017 Macdonald Avenue, Richmond, California,
Attorney for Petitioners.

FILED

JUN - 9 1959

PAUL P. O'BRIEN, CLERK



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No. 16,304

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**On Petition for Review of the Decision of the
Tax Court of the United States.**

BRIEF FOR PETITIONERS.

JURISDICTIONAL STATEMENT.

This is a petition to review a decision of the Tax Court of the United States.

The petitioners are executors of an estate of a decedent who died August 16, 1950, a resident of California (R. 26). The estate tax return was filed with the Collector of Internal Revenue for the 1st District of California, at San Francisco, California. The hearing before the Tax Court of the United States was

held in San Francisco (R. 54). The proceedings were held pursuant to a 90-day letter issued February 14, 1955 by the District Director of the San Francisco Office of the Commissioner of Internal Revenue (R. 9), a petition for redetermination by the taxpayer was filed April 26, 1955 (R. 3, 5), and was answered by the Commissioner of Internal Revenue (R. 17).

The findings of fact and opinion of the Tax Court were rendered April 28, 1958 (R. 25); the decision was entered August 8, 1958 (R. 49). The petition for review was filed September 25, 1958 (R. 50-51).

The Tax Court had jurisdiction under 26 U.S.C. 7442. The Court of Appeals for the Ninth Circuit has jurisdiction under 26 U.S.C. 7482, 7483 (Internal Revenue Code of 1954, Section 7482).

STATEMENT OF THE CASE.

This case involves a deficiency in estate tax in the sum of \$29,601.88. The Commissioner disallowed the marital deduction and treated all property of decedent and his spouse as community property. The estate tax return was prepared on the basis that the property included therein was the separate property of decedent with the exception of (1) Insurance listed in Schedule D, returned as community property, and (2) Jointly Owned Property, Schedule E. The return showed, under Schedule E, as the property of

the surviving joint tenant, a savings account, Bank of America, Marina Branch, in the amount of \$19,668.96, and Series E, U. S. Savings Bonds, valued at \$19,585.00, standing in the name of Mrs. Elizabeth S. Vogel or Les Vogel.

The Commissioner added to the gross estate as community property the foregoing bank account and Series E, U. S. Savings Bonds. In addition, there was added to the gross estate as community property the following property not included in the return and claimed by petitioners to be the separate property of the surviving spouse:

4 shares Pacific Turf Club stock, valued at	\$1,700.00
500 shares Pacific Gas & Electric Redeemable, First Preferred stock, valued at	7,156.25
467 shares Bank of America stock, valued at	6,333.69
217 shares Pacific Gas & Electric Common stock, valued at	3,499.13
250 shares Leslie Financing Company, valued at	5,627.62
Anzavista Apartment property, valued at	8,800.00
Savings Account, Marina Branch, Bank of America, valued at	1,181.74

The Commissioner in treating all property as community property decreased all expenses of administration and debts of decedent by one-half, except for the disallowance in full of maintenance and upkeep of a boat which is not in issue.

The Commissioner disallowed the marital deduction. The Commissioner decreased the family allowance from \$1,500.00 per month for eighteen (18) months to \$1,000.00 per month for eighteen (18) months and reduced the amount further by one-half (on a community property basis).

The issues are:

- A. The character of the property involved, whether community property or the separate property, respectively, of decedent and his surviving spouse, by transmutation from community property or by purchase from separate earnings.
- B. Whether or not such property was transmuted into separate property, and, if so, did the transmutation take place exclusive of the year 1942, and prior to April 2, 1948 so as to qualify for the marital deduction.
- C. Whether or not \$1,500.00 per month for eighteen (18) months for family allowance was reasonable under the circumstances.
- D. Whether or not the full amount of funeral expenses are deductible in computing the tax.
- E. Whether or not additional attorneys' fees in the amount of \$2,500.00 paid counsel for petitioners are deductible from the gross estate in computing the tax.

Petitioner does not contest the disallowance of maintenance and upkeep on boat claimed as an administration expense.

**SPECIFICATION OF ERRORS RELIED
UPON BY PETITIONERS.**

1. The Tax Court erred in holding that the evidence failed to establish that a transmutation took place and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property.

2. The Tax Court erred in holding that the evidence did not establish that a family allowance in excess of \$1,000.00 per month, to wit, \$1,500.00 per month, for eighteen (18) months was a reasonable and proper deduction from the gross estate.

3. The Tax Court erred in failing to allow as a deduction in computing the tax additional attorneys' fees in the amount of \$1,000.00 paid subsequent to filing of the petition for redetermination and prior to the decision of the Tax Court.

4. The Tax Court erred in failing to allow the full amount of funeral expenses as a deduction in computing the tax.

First Specification of Error—Findings of the Tax Court and Objections Thereto.

With respect to the first specification of error the Tax Court found as follows:

“Findings of Fact

Some of the facts are stipulated, the stipulation being incorporated herein by this reference.

Decedent, J. Leslie Vogel, died August 16, 1950, a resident of California. A Federal estate tax return was filed on February 15, 1952, by the execu-

tors of his estate with the collector of internal revenue for the First District of California.

On January 15, 1934, the Les Vogel Chevrolet Company was incorporated to operate an automobile agency. The stock of the corporation was community property of J. Leslie Vogel (hereinafter referred to as decedent or Les Vogel), and his wife, Elizabeth S. Vogel (hereinafter sometimes referred to as Elizabeth Vogel or Elizabeth).

In 1942, decedent, in order to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business, and for other reasons, decided to dissolve the corporation and to form a limited partnership. The corporate minutes indicate that the assets of the corporation were transferred to decedent as of midnight, December 31, 1942. A resolution was written in 1942 looking to the dissolution of the corporation. The partnership agreement was executed on February 6, 1943, and named Elizabeth Vogel and Les Vogel, Jr., as limited partners, with decedent as a general partner for a term of ten years from January 1, 1943, each having an equal share in the profits. The opening entries in the partnership ledger show the following capital accounts:

Les Vogel	\$33,147.71
Les Vogel, Jr.	33,147.70
Mrs. Les Vogel	33,147.70

Separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to Elizabeth's account was a monthly allowance of \$100 and a monthly payment of \$500 on an F.H.A. loan on

the family residence. Taxes on the residence were charged to decedent's drawing account.

On November 1, 1946, the business was again incorporated. The partnership balance sheet, as of October 31, 1946, filed with the application for incorporation, showed the following

Accounts payable:

Les Vogel	\$ 66,083.09
Elizabeth Vogel (Mrs. Vogel)	73,880.64
Les Vogel, Jr.	37,664.26
	<hr/>
	\$177,627.99

Partners' capital:

Les Vogel	\$ 32,709.22
Elizabeth Vogel	32,709.20
Les Vogel, Jr.	32,709.20
	<hr/>
	\$ 98,127.62

The opening balance sheet for the corporation showed the following:

Capital stock	\$150,000.00
	<hr/> <hr/>

Accounts payable:

Les Vogel and Elizabeth Vogel	\$105,382.15
Les Vogel, Jr.	20,373.46
	<hr/>
	\$125,755.61
	<hr/> <hr/>

In order to provide a \$50,000 payment by each partner for the stock issued, the amounts necessary to bring each of the partnership capital accounts up to \$50,000 were taken from the accounts payable. One-third of the stock in the new corporation was issued to each of the former partners.

Decedent and Elizabeth held theirs individually in their own names. The value of the capital stock was subsequently increased to \$300,000 with 30,000 shares outstanding. At the time of decedent's death, decedent, Elizabeth, and Les Vogel, Jr., each held 10,000 shares.

Decedent and Elizabeth maintained two savings accounts in both their names, a savings account in the name of Elizabeth Vogel, and a checking account in the names of Les or Elizabeth Vogel.

Following the dissolution of the partnership the separate drawing accounts of decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of decedent, along with other items, were charged against this account. With the exception of income tax, the only charge to the account specifically applicable to Elizabeth was a \$3,000 gift to their son. A similar \$3,000 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance was divided into two equal parts of \$11,662.05. One part was deposited in the savings account at the Marina Branch of the Bank of America in the name of Elizabeth Vogel. Some of decedent's salary checks were also deposited there. Later, these amounts were transferred to the checking account.

The other portion of the drawing account was deposited in the savings account in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of the Bank of America. It was subsequently withdrawn.

The principal deposits to the savings account in the name of J. Les and Elizabeth Vogel at

Branch 253 of the Bank of America were salary checks of the decedent. Elizabeth made most of these deposits; it was her practice to retain \$100 to \$300 from the checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account.

Not all salary checks were deposited in the savings accounts; a number were deposited in the checking account. Decedent made payments from the checking account for his own individual expenditures, for joint living expenses, and for investments in Elizabeth's name.

Decedent and Elizabeth maintained separate brokerage accounts, decedent's account being opened in 1946 and Elizabeth's in 1948. Purchases by decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in Elizabeth's brokerage account were paid for from the checking account.

Payment for 467 shares of Bank of America stock standing in Elizabeth Vogel's name was also made from the checking account.

In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, Les Vogel, Jr., and Dorothea Vogel. Each contributed \$10,000 to the initial capital. Elizabeth obtained the necessary funds from previous investments.

About 1950 Elizabeth purchased a parcel of real property from Arthur M. Hardy, an old friend of the family. Hardy then designed and built the Anzavista Apartments on the property. All of Hardy's negotiations in the matter were with

Elizabeth and the apartments were built for her. The record is inconclusive as to the source of the funds for the apartment venture.

During a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista's property as decedent's. She further represented that whatever property she and decedent had belonged to both of them. At the trial Elizabeth referred to the Anzavista property as 'the whole family's.'

The tax returns of decedent and Elizabeth Vogel for 1940 and all subsequent years were prepared by Lawrence H. Goebel, a certified public accountant. The information for these returns was mostly obtained from the office manager of the Les Vogel Chevrolet Company. Goebel reviewed the returns with the decedent, but could not recall discussing the nature of the property with him. Goebel assumed that the income from the various sources was community property, to be split accordingly.

Separate Federal returns were filed for the years 1946 and 1947, and joint returns for the years 1948, 1949, and 1950. Separate state returns were filed for the entire period 1946 through 1950. Historically, dividends were divided between decedent and Elizabeth Vogel. This was also true of dividends from stock registered in decedent's or Elizabeth Vogel's name, or both names jointly. It was true of capital gain or loss on the sale of such securities. The dividends from the Les Vogel Chevrolet Company were always divided equally between decedent and Elizabeth Vogel.

On the 1947 Federal return the capital gains on the sale of securities were described as commu-

nity. On the 1947 state returns the total income reported was described as community.

Upon the advice of attorneys, decedent's and Elizabeth Vogel's dividends were segregated for the first time on the 1950 state tax returns filed after decedent's death.

Robert G. Partridge was decedent's personal attorney for approximately 15 years, beginning in the mid-1930's. Partridge and his associate, Wallace O'Connell, prepared two wills for decedent. The first will was executed December 13, 1946. The second was never signed.

The first will contained the following provisions:

Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dispose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. She shall, in any event, however, be entitled to exempt property and family allowance out of my estate.

Notes taken by Partridge during a discussion with decedent prior to the drafting of the first will included the words 'transmutation agreement (Jan. 1, '43).' Partridge had had no inde-

pendent knowledge of this subject and wrote down only what information decedent communicated to him. At no time during their discussions concerning the will did decedent show Partridge any written agreement which would have transmuted community to separate property.

Decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company.

The second, and unsigned, will was drafted for decedent in 1950. A draft of a proposed will for Elizabeth Vogel was prepared at approximately the same time. Both drafts refer to a written agreement converting their community property to separate property.

During discussions concerning the second will Partridge suggested to decedent that it would be best to have some expression of the transmutation agreement in writing. No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written.

Partridge did not know in fact whether there ever was a transmutation." . . .

"The respondent determined that the entire gross estate of decedent and Elizabeth Vogel was community property and recomputed the tax on a community property basis. The following assets standing in the name of Elizabeth Vogel were added to the gross estate:

4 shares Pacific Turf Club stock	\$1,700.00
500 shares Pacific Gas & Electric redeemable first preferred stock.....	7,156.25
467 shares Bank of America stock..	6,333.69
217 shares Pacific Gas & Electric common stock.....	3,499.13
250 shares Leslie Financing Com- pany.....	5,627.62
Anzavista Apartments property.....	8,800.00
Savings Account, Marina Branch of Bank of America.....	1,181.74 "

The petitioners take exception to the portion of the foregoing findings as follows (R. 33): "No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written."

That portion of the record hereinafter quoted is considered to be testimony that such an agreement existed (R. 138-139):

"A. Mr. Vogel—these notes now remind me—had taken a position when he talked to me initially that this property had been transmuted. He didn't know the details, and I didn't either, frankly. I felt that in order to sanctify the situation or to implement it, shall I say, assuming it had been done in the first place, it would be better to have some expression in writing, and I suggested that to him, and that is reflected in those later notes that are now in evidence—I have forgotten the exhibit number—but again it was something, a relationship something like this, Mr. Resnick: Mr. (Testimony of Robert G. Part-

ridge) Vogel was not skilled in the law or in the ways of business or estates of this sort. When he did talk to me initially he always took the position, 'This is Mrs. Vogel's property,' as her own, but was never able to very clearly, or at all clearly, tell me why it was. Therefore, when you ask me whether I pursued it, I did at the time this second will was discussed, and at that time said we ought to set it down in writing so there would be no question about it.

Q. Did you discuss that at all with Mrs. Vogel?

A. Not to my recollection.

Q. And Mr. Vogel used the term 'separate property' and the term 'community property'?

A. Undoubtedly, but I can't sit here and tell you that I specifically remember it. Whatever terms he used, may I say, that he conveyed to me, as we were discussing these matters, that he was under that impression, the interest of Mrs. Vogel in the company was her own property, as such, call it separate, as it should be, or otherwise, the effect that I gathered or the understanding that I gathered from his discussions was the same." (R. 138-139.)

Second Specification of Error—Findings of the Tax Court.

As to the reasonableness of the deduction for family allowance, the Tax Court found as follows:

"At the time of decedent's death, decedent, Elizabeth Vogel, their son Les Vogel, Jr., and their daughter Dorothea lived in a three-story detached dwelling at 369 Marina Boulevard, San Francisco. Both Les, Jr., and Dorothea were over 21. The residence, located in a wealthy neighborhood, had been acquired in 1941 and was held in

the name of Les Vogel and Elizabeth Vogel as joint tenants.

They employed a full-time maid and a gardener; the maid 'lived in.' Elizabeth also, on occasion employed caterers; she entertained approximately once a month.

During his lifetime most of decedent's salary, which was about \$1,800 a month, was expended in maintaining the home.

After decedent's death, Les Vogel, Jr., and Dorothea continued to occupy the house with their mother and a servant. Neither Les Vogel, Jr., nor Dorothea made any contribution to the maintenance of the home, either before or after decedent's death.

On September 7, 1950, Elizabeth Vogel filed a petition with the Superior Court of the State of California, San Francisco County, for a family allowance of \$1,500 a month from the estate of J. Leslie Vogel. On September 19, 1950, the Judge of the Superior Court entered an order granting the allowance. During the probate of the estate, checks totalling \$27,000 were paid to Mrs. Vogel as a family allowance.

Decedent's will was admitted to probate and Elizabeth Vogel filed an election to take under its provisions on September 12, 1952.

A Federal estate tax return was filed on February 15, 1952. Various securities and miscellaneous assets were treated on the return as decedent's separate property. No reference was made to certain property standing in the name of Elizabeth Vogel alone. Deductions were claimed on the return for a bequest to surviving spouse (marital deduction) of \$61,077.66 and an allow-

ance for support of dependents (family allowance) paid to Elizabeth Vogel totalling \$27,000.00 (\$1,500 per month for 18 months).'' (R. 34-35)

It is contended by petitioners that such findings sustain petitioners' position that \$1,500 per month for 18 months should be fully allowed as a deduction.

Third and Fourth Specifications of Error.

Petitioners contend that the allowance or disallowance of additional attorneys' fees and the inclusion of the full amount or only one-half of the funeral expenses as deductions from the gross estate are questions of law and procedure and such deductions should be allowed in full.

ARGUMENT.

FIRST SPECIFICATION OF ERROR—THE TAX COURT ERRED IN HOLDING THAT THE EVIDENCE FAILED TO ESTABLISH THAT A TRANSMUTATION TOOK PLACE AND THAT THE COMMISSIONER CORRECTLY DETERMINED THAT THE ENTIRE PROPERTY OF DECEDENT AND HIS SPOUSE WAS COMMUNITY PROPERTY.

The evidence supports the following facts:

1. The original accumulations of decedent and his spouse, including stock of Les Vogel Chevrolet Company, prior to 1943 were community property (R. 26).

2. A limited partnership was formed on January 1, 1943, consisting of Elizabeth Vogel and Les Vogel, Jr., as limited partners and decedent as a general

partner with each having separate drawing and capital accounts (R. 27).

3. On November 1, 1946, approximately a month and a half after decedent's probated will was executed (R. 27, 32), the business was again incorporated. Stock was issued individually in the names of decedent, his spouse, and his son with one-third outstanding stock issued to each.

4. On October 31, 1947 the balance of the corporation drawing account of decedent and his spouse was divided into two equal parts. One part was deposited in a savings account in the name of Elizabeth Vogel (R. 29).

5. In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, her son, and her daughter (R. 30). Elizabeth obtained her \$10,000 contribution from previous investments.

6. In 1950 Elizabeth Vogel acquired the Anzavista property in her own name.

7. The following assets were acquired by Elizabeth Vogel and stood in her name:

4 shares Pacific Turf Club stock.....	\$1,700.00
500 shares Pacific Gas & Electric re-	
deemable preferred stock.....	7,156.25
467 shares Bank of America stock.....	6,333.69
217 shares Pacific Gas & Electric com-	
mon stock	3,499.13
250 shares Leslie Financing Company.....	5,627.62
Anzavista Apartments property.....	8,800.00
Savings account, Marina Branch of	
Bank of America.....	1,181.74

8. Notes taken by decedent's personal attorney prior to drafting the first will included the words "transmutation agreement (January 1, 1943)."

Petitioner contends that the Tax Court correctly stated the law to the following extent (R. 36-37):

"In California, community property may be transmuted to separate property by oral agreement between the spouses.¹ *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905 (1944). It is not always necessary to show oral agreement; the status of the property may be demonstrated by the nature of the transaction or appear from the surrounding circumstances. *Long v. Long*, 88 Cal. App. 2d 544, 199 P. 2d 47 (1948)."

The Tax Court further stated the following to be the law (R. 37):

"It should be noted, however, that property acquired by either the husband or the wife, or both, after marriage is presumed to be community property, and one asserting that such property is separate rather than community has the burden of establishing that fact.² *Wilson v. Wilson*, 76 Cal. App. 2d 119, 172 P. 2d 568 (1946)".

¹Cal. Civ. Code: Sec. 158. Contracts with each other and third persons: Husband and Wife May Make Contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on Trusts.

²Cal. Civ. Code: Sec. 164. Community property; presumptions as to property acquired by wife; limitation of actions.

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter

The Tax Court further stated (R. 38):

“There is a disputable presumption in California law that property acquired by a married woman by an instrument in writing is her separate property.³ *Nichols v. Mitchell*, 32 Cal. 2d 598, 197 P. 2d 550 (1948). Petitioners, however, may not depend on this presumption alone to overcome the respondent’s determination that the property in question is community. Cf. *Shea v. Commissioner*, 81 F. 2d 937 (C.A. 9, 1936), affirming 30 B.T.A. 1265.”

In *Nichols v. Mitchell*, 32 Cal. 2d 598, cited by the Tax Court the evidence showed that all community assets were put in the wife’s name to protect them from creditors and the Court held that such evi-

acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property, but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder’s office of such conveyances, respectively.

³Cal. Civ. Code, Sec. 164, *supra*.

dence would overcome the presumption arising from Section 164 of the California Civil Code.

The case of *Shea v. Commissioner* is not applicable in that the property involved therein was either the husband's separate property or community property and none was claimed to be the separate property of the wife.

In California the wife enjoys a more favorable status than her husband with respect to separate property as a result of the presumption arising from Section 164 of the California Civil Code.

This Court recognized this distinction in the case of *Acme Distributing Company v. Collins*, 247 F. 2d 607, with respect to property standing in the name of the wife. The Court there said:

“A full and scholarly discussion of this entire subject is to be found in the recent case of *Nevins v. Nevins*, 1954, 129 Cal. App. 2d 150, 153-154, 276 P.2d 655, 657, petition for a hearing by the State Supreme Court denied, 1955. There the Court used the following language:

“From the earliest period of California history Courts have adhered to the Spanish law rule accepted in community property states that the presumption attending the possession of property by either husband or wife is that it belongs to the community. Exceptions to the rule must be proved, and the burden rests with the claimant of the separate estate. [Cases cited.]

“In 1889, however, by direct statutory change, the foregoing general rule was modified as to properties held in the wife's name. In those situations,

according to the addition to Civil Code, §164, where property is acquired during marriage by a married woman by an instrument in writing, the presumption is not that the property is community, but the contrary, that it is separate. [Authorities cited] The burden is then upon the husband seeking to claim the property for the community. [Cases cited] Originally this portion of Civil Code, section 164, was limited to conveyances of real property [Authorities cited] but a further amendment in 1927 extended its application to acquisition of any interest in or encumbrance on real or personal property. [Authorities cited.]

“As against the husband, the presumption is disputable, and may be controverted by other evidence, direct or indirect. But the evidence to overthrow the presumption must be ‘clear and convincing’. [Cases cited.] Whether or not it is so controverted is a question of fact for the trial Court, its conclusions, unless manifestly without sufficient support in the evidence, being conclusive on appeal. [Cases cited.]”

In *Auener v. Suiter*, 1920, 46 Cal. App. 301, 304, 189 P. 120, 121, the Court said:

“We have, then, a case where the wife held a grant, bargain, and sale deed of the property executed to her as sole grantee. This is strong evidence in favor of the respondent’s case and must prevail unless overcome by other evidence.

“‘It is true that the presumption established by section 164 of the Civil Code is not conclusive but may be disputed and overcome by other testimony. *Nevertheless, however, the presumption is itself evidence which may outweigh the positive*

testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony.' [Cases cited.]" [Emphasis supplied.]

The rule in favor of the wife has been recognized to the extent that payments from community funds on the husband's property give rise to a community interest in the property while payments from community funds on property standing in the name of the wife are presumed, in the absence of an agreement to the contrary, to constitute a gift to her. (*Estate of Bernatas* (1958) 162 C.A. 2d 693, 328 P. 2d 539.)

In the case of *Ciambetti v. Dept. Alcoholic Bev. Control*, 161 Cal. App. 2d 340 (1958) at page 345, 326 P. 2d 535 the Court said:

"[2] It is the general rule that '. . . the character of property as separate or community is fixed as of the time it is acquired. The character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties.' (*Garten v. Garten*, 140 Cal. App. 2d 489, 492 [295 P. 2d 23].) [3] 'The law will not allow idle presumption to be indulged in as against a deed delivered and recorded. Facts must be proven from which it is clearly made to appear that the property, in such case, is community property, or the deed will be given effect according to its terms.' (*Alferitz v. Arrivillaga*, 143 Cal. 646, 649 [77 P. 657].) [1b] Here the evidence shows without conflict that the real property was purchased in plaintiff's name as sole grantee, as was the license. [4] Under such circumstances it is the presumption, under section 164 of the Civil Code, that

the property so purchased was the separate estate of the wife. It is a strong presumption (*Acme Distributing Co. v. Collins*, 247 F. 2d 607) and cannot be overthrown except by clear and convincing proof. (*Attebury v. Wayland*, 73 Cal. App. 2d 1, 5 [165 P. 2d 524].) Nor can it be rebutted solely by evidence as to the source of the funds. (*Gudelj v. Gudelj*, 41 Cal. 2d 202 [259 P. 2d 656].) It is the further rule that the money which was borrowed on the credit of such property was also plaintiff's separate estate. [1c] The fact that both spouses joined in the execution of the deeds of trust or mortgages given to secure the notes evidencing the loans did not alter the original status of the property. (*Dyment v. Nelson*, 166 Cal. 38 [134 P. 988].) The improvements, even if made by the husband upon the wife's separate property and out of community funds, gave him no interest therein. (*Holtze v. Holtze*, 2 Cal. 2d 566 [42 P. 2d 323].) Nor could the other incidental acts of the husband in relation to the management of the property be considered as acts indicating ownership such as would overcome the presumption. (*Kimbrow v. Kimbro*, 199 Cal. 344 [249 P. 180].)"

It is respectfully submitted that as to the property standing in the name of Elizabeth Vogel, the presumption arising from Section 164 of the California Civil Code that such property was her separate property has not been overcome by clear and convincing evidence. To the contrary, the evidence concerning the treatment of the property by decedent, including his understanding thereof as conveyed to his attorney, lends further support to the presumption that the property was the separate property of Elizabeth Vogel.

SECOND SPECIFICATION OF ERROR—THE TAX COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT ESTABLISH THAT A FAMILY ALLOWANCE IN EXCESS OF \$1,000.00 PER MONTH, TO WIT, \$1,500.00 PER MONTH FOR EIGHTEEN (18) MONTHS WAS A REASONABLE AND PROPER DEDUCTION FROM THE GROSS ESTATE.

The amount of \$1,500.00 per month for eighteen (18) months was reasonable and no more than necessary to support the widow in the same manner she was accustomed to in the past. In *Estate of Louis Richards v. Commissioner*, 20 T.C. 904, the Court said:

“In the administration of the estate of the decedent the probate Court allowed the sum of \$1,500 per month as an allowance from the estate for the support of the widow during the administration of the estate. Under such allowance the total sum of \$30,000 was paid over a period of 20 months and approved by the Court. Respondent, in determining the deficiency, reduced this allowance to \$22,500. Decedent left a considerable estate and the allowance granted by the Court was no more than necessary to support the surviving spouse in the same manner she was accustomed to in the past. Her expenditures for living expenses during the period in question have been shown to be in excess of the amount allowed. There is no evidence that the administration of the estate was prolonged for an unreasonable time in order to secure an excessive allowance. Under such circumstances we have concluded that the allowance was reasonable, and respondent's action in reducing this item is reversed.”

The facts herein come within the limitations prescribed by Reg. 105, Sec. 81.40 which states:

“* * * The support of dependents of the decedent during the settlement of the estate is deductible but pursuant to the following rules:

(a) In order to be deductible, the allowance must be authorized by the laws of the jurisdiction in which the estate is being administered, and not in excess of what is reasonably required.

(b) The allowance for which deduction may be made is limited to support during the settlement of the estate. Any allowance for a more extended period is not deductible.

(c) There must be an actual disbursement from the estate to the dependents, but after payment has been made the right of deduction is not affected by the fact that the dependents do not expend the entire amount for their support during the settlement of the estate.”

In *Estate of Ralph Rainger*, 12 T.C. 483 on page 498, this Court said:

“It is apparent that the widow and children are dependents of the decedent within the meaning of *Estate of Jacobs*, 8 T.C. 1015. It is apparent also that California grants a family allowance of support in accordance with a prior mode of living. See *Estate of Bump*, 152 Cal. 274; 92 Pac. 643; *Estate of Cowell*, 164 Cal. 636; 130 Pac. 209. The amount of support is not conditioned by the fact that the dependents may have had separate income. *Estate of Middlekauff*, 2 T.C. 203.

However, after applying the statute and quoted regulations to the facts as disclosed by the record, and having considered all the pertinent factors pointed out by the parties hereto, we have reached the conclusion, already appearing in our findings

of fact, that the amount of \$50,000 constitutes an allowance for the support of decedent's dependents during the settlement of the estate which was reasonably required and actually expended."

It is respectfully submitted that the family allowance paid in the amount of \$1,500.00 per month for eighteen (18) months was a proper deduction from the gross estate.

THIRD SPECIFICATION OF ERROR—THE TAX COURT ERRED IN FAILING TO ALLOW AS A DEDUCTION IN COMPUTING THE TAX ADDITIONAL ATTORNEYS' FEES IN THE AMOUNT OF \$1,000 PAID SUBSEQUENT TO FILING OF THE PETITION FOR REDETERMINATION.

Counsel for petitioners was paid \$1,000 for representing petitioners at the trial of the matter before the Tax Court (R. 185, 186). This amount is a proper deduction. *Estate of Frank F. Tillotson v. Commissioner*, 44 B.T.A. 644; *Leewitz v. Commissioner*, 75 F. Supp. 312; Estate Tax Regulations 105 Sec. 81.34.

"Reg. 105, Sec. 81.34 Attorney's fees.—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper Court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local

law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed. . . ."

Counsel has been paid an additional \$1,500 for prosecuting this appeal for which claim is hereby made for allowance of said amount as a deduction from the gross estate.

FOURTH SPECIFICATION OF ERROR—THE TAX COURT ERRED IN FAILING TO ALLOW THE FULL AMOUNT OF FUNERAL EXPENSES AS A DEDUCTION IN COMPUTING THE TAX.

This specification of error is solely a question of law. In computing the tax the Commissioner allowed only one-half of the funeral and administration expenses as a deduction from the gross estate (R. 13) which figures were presented by respondent in their computation under Rule 50 of the Tax Court (R. 45, 46) and objected to by petitioners (R. 47).

The administration's expenses are deductible in full except for community property involved. Where the estate consists entirely of community property, funeral

expenses for the decedent and allowances for the support of dependents are deductible in the full amounts thereof from the decedent's gross estate. See *Estate of Worth S. Lee*, 11 Tax Court 141.

In the interest of justice this Court has power to decide whether such deductions should be allowed even though not raised by the pleadings. *Hormel v. Helvering*, 312 U.S. 552; *U. S. v. Merrill*, 211 F. 2d 297.

CONCLUSION.

It is respectfully submitted that the Tax Court was in error in the specifications herein set forth and judgment should be rendered in favor of petitioners.

Dated, Richmond, California,

June 1, 1959.

Respectfully submitted,

GRANT G. CALHOUN,

Attorney for Petitioners.

**In the United States Court of Appeals
for the Ninth Circuit**

**ESTATE OF J. LESLIE VOGEL, ROBERT G. PARTRIDGE
and ELIZABETH S. VOGEL, Executors, PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16304

ESTATE OF J. LESLIE VOGEL, ROBERT G. PARTRIDGE
and ELIZABETH S. VOGEL, Executors, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and the opinion of the Tax Court (R. 25-44) are reported at 30 T.C. 125.

JURISDICTION

This petition for review (R. 50-51) involves federal estate taxes upon the estate of J. Leslie Vogel, a resident of California who died on August 16, 1950 (R. 26.) On February 14, 1955, the Commissioner of Internal Revenue mailed to the taxpayers, executors, notice of a deficiency in the total amount of \$29,-601.88. (R. 9-16.) Within 90 days thereafter and on April 26, 1955, the taxpayers filed a petition with

the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3, 5-16.) The decision of the Tax Court was entered on August 8, 1958. (R. 49.) The case is brought to this Court by a petition for review filed on September 15, 1958. (R. 4, 50-51.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court properly found that the evidence failed to establish a transmutation of community property to separate property and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property.

2. Whether the taxpayers failed to demonstrate that an amount in excess of \$1,000 per month for 18 months was a reasonable family allowance for the sole support of the widow in ascertaining the deduction for family allowance from the gross estate.

3. Whether the deduction for attorney fees could be raised as a new issue under the Tax Court Rule 50 computation.

4. Whether the deduction in full of funeral expenses was timely raised in the Tax Court Rule 50 computation, and, assuming it was timely, whether the deduction was properly limited to one-half the amount of the funeral expenses.

STATEMENT

The facts as found by the Tax Court (R. 25-36), some of which were stipulated (R. 18-25), are as follows:

The decedent, J. Leslie Vogel, died August 16, 1950, a resident of California. A federal estate tax return was filed on February 15, 1952, by the executors of his estate with the Collector of Internal Revenue for the First District of California. (R. 26)

On January 15, 1934, the Les Vogel Chevrolet Company was incorporated to operate an automobile agency. The stock of the corporation was community property of J. Leslie Vogel (hereinafter referred to as decedent or Les Vogel), and his wife, Elizabeth S. Vogel (hereinafter sometimes referred to as Elizabeth Vogel or Elizabeth). (R. 27)

In 1942, the decedent, in order to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business and for other reasons, decided to dissolve the corporation and to form a limited partnership. The corporate minutes indicate that the assets of the corporation were transferred to the decedent as of midnight, December 31, 1942. A resolution was written in 1942 looking to the dissolution of the corporation. The partnership agreement was executed on February 6, 1943, and named Elizabeth Vogel and Les Vogel, Jr., as limited partners, with decedent as a general partner for a term of 10 years from January 1, 1943, each having an equal share in the profits. The opening entries in the partnership ledger show the following capital accounts: (R. 27)

Les Vogel	\$33,147.71
Les Vogel, Jr.	33,147.70
Mrs. Les Vogel	33,147.70

Separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to Elizabeth's drawing account was a monthly allowance of \$100 and a monthly payment of \$500 on an F. H. A. loan on the family residence. Taxes on the residence were charged to decedent's drawing account. (R. 27)

On November 1, 1946, the business was again incorporated. (R. 27.) The partnership balance sheet, as of October 31, 1946, filed with the application for incorporation, showed the following (R. 28):

Accounts payable:

Les Vogel	\$66,083.09
Elizabeth Vogel (Mrs. Vogel)	73,880.64
Les Vogel, Jr.	37,664.26
	<u>\$177,627.99</u>

Partners' capital:

Les Vogel	\$32,709.22
Elizabeth Vogel	32,709.20
Les Vogel, Jr.	32,709.20
	<u>\$98,127.62</u>

The opening balance sheet for the corporation showed the following (R. 28):

Capital stock	<u>\$150,000.00</u>
Accounts payable:	
Les Vogel and Elizabeth Vogel	\$105,382.15
Les Vogel, Jr.	20,373.46
	<u>\$125,755.61</u>

In order to provide a \$50,000 payment by each partner for the stock issued, the amounts necessary to bring each of the partnership capital accounts up to \$50,000 were taken from the accounts payable. One-third of the stock in the new corporation was issued to each of the former partners. The decedent and Elizabeth held theirs individually in their own names. The value of the capital stock was subsequently increased to \$300,000 with 30,000 shares outstanding. At the time of the decedent's death, decedent, Elizabeth, and Les Vogel, Jr., each held 10,000 shares. (R. 28-29.)

The decedent and Elizabeth maintained two savings accounts in both their names, a savings account in the name of Elizabeth Vogel, and a checking account in the name of Les or Elizabeth Vogel. (R. 29.)

Following the dissolution of the partnership the separate drawing accounts of the decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of the decedent, along with other items, were charged against this account. With the exception of income tax, the only charge to the account specifically applicable to Elizabeth was a \$3,000 gift to their son. A similar \$3,000 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance was divided into two equal parts of \$11,662.05. One part was deposited in the savings account at the Marina Branch of the Bank of America in the name of Elizabeth Vogel. Some of the decedent's salary checks were also deposited there. Later,

these amounts were transferred to the checking account. (R. 29.)

The other portion of the drawing account was deposited in the savings account in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of the Bank of America. It was subsequently withdrawn. (R. 29-30.)

The principal deposits to the savings account in the name of J. Les and Elizabeth Vogel at Branch 253 of the Bank of America were salary checks of the decedent. Elizabeth made most of these deposits; it was her practice to retain \$100 to \$300 from the checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account. (R. 30.)

Not all salary checks were deposited in the savings accounts; a number were deposited in the checking account. The decedent made payments from the checking account for his own individual expenditures, for joint living expenses, and for investments in Elizabeth's name. (R. 30.)

The decedent and Elizabeth maintained separate brokerage accounts, decedent's account being opened in 1946 and Elizabeth's in 1948. Purchases by the decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in Elizabeth's brokerage account were paid for from the checking account. (R. 30.)

Payment for 467 shares of Bank of America stock standing in Elizabeth Vogel's name was also made from the checking account. (R. 30.)

In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, Les Vogel, Jr., and Dorothea Vogel. Each contributed \$10,000 to the initial capital. Elizabeth obtained the necessary funds from previous investments. (R. 30-31.)

About 1950 Elizabeth purchased a parcel of real property from Arthur M. Hardy, an old friend of the family. Hardy then designed and built the Anzavista Apartments on the property. All of Hardy's negotiations in the matter were with Elizabeth and the apartments were built for her. The record is inconclusive as to the source of the funds for the apartment venture. (R. 31.)

During a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista property as decedent's. She further represented that whatever property she and decedent had belonged to both of them. At the trial Elizabeth referred to the Anzavista property as "the whole family's". (R. 31.)

The tax returns of the decedent and Elizabeth Vogel for 1940 and all subsequent years were prepared by Lawrence H. Goebel, a certified public accountant. The information for these returns was mostly obtained from the office manager of the Les Vogel Chevrolet Company. Goebel reviewed the returns with the decedent, but could not recall discussing the nature of the property with him. Goebel assumed that the income from the various sources was community property, to be split accordingly. (R. 31.)

Separate federal returns were filed for the years 1946 and 1947, and joint returns for the years 1948,

1949, and 1950. Separate state returns were filed for the entire period 1946 through 1950. Historically, dividends were divided between the decedent and Elizabeth Vogel. This was also true of dividends from stock registered in the decedent's or Elizabeth Vogel's name, or both names jointly. It was true of capital gain or loss on the sale of such securities. The dividends from the Les Vogel Chevrolet Company were always divided equally between the decedent and Elizabeth Vogel. (R. 31-32.)

On the 1947 federal return the capital gains on the sale of securities were described as community. On the 1947 state returns the total income reported was described as community. (R. 32.)

Upon the advice of attorneys, decedent's and Elizabeth Vogel's dividends were segregated for the first time on the 1950 state tax returns filed after the decedent's death. (R. 32.)

Robert G. Partridge was the decedent's personal attorney for approximately 15 years, beginning in the mid-1930's. Partridge and his associate, Wallace O'Connell, prepared two wills for the decedent. The first will was executed December 13, 1946. The second was never signed. (R. 32.)

The first will contained the following provisions (R. 32-33):

Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dis-

pose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. She shall, in any event, however, be entitled to exempt property and family allowance out of my estate.

Notes taken by Partridge during a discussion with the decedent prior to the drafting of the first will included the words "transmutation agreement (Jan. 1, '43)". Partridge had had no independent knowledge on this subject and wrote down only what information the decedent communicated to him. At no time during their discussions concerning the will did the decedent show Partridge any written agreement which would have transmuted community to separate property. (R. 33.)

The decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company. (R. 33.)

The second, and unsigned, will was drafted for the decedent in 1950. A draft of a proposed will for Elizabeth Vogel was prepared at approximately the same time. Both drafts refer to a written agreement converting their community property to separate property. (R. 33.)

During discussions concerning the second will Partridge suggested to the decedent that it would be best to have some expression of the transmutation agreement in writing. No agreement transmuting the

property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written. (R. 33.)

Partridge did not know in fact whether there ever was a transmutation. (R. 34.)

At the time of the decedent's death, decedent, Elizabeth Vogel, their son, Les Vogel, Jr., and their daughter Dorothea lived in a three story detached dwelling at 369 Marina Boulevard, San Francisco. Both Les, Jr., and Dorothea were over 21. The residence, located in a wealthy neighborhood, had been acquired in 1941 and was held in the name of Les Vogel and Elizabeth Vogel as joint tenants. (R. 34.)

They employed a full-time maid and a gardner; the maid "lived in". Elizabeth also, on occasion, employed caterers; she entertained approximately once a month. (R. 34.)

During his lifetime most of the decedent's salary, which was about \$1,800 a month, was expended in maintaining the home. (R. 34.)

After the decedent's death, Les Vogel, Jr., and Dorothea continued to occupy the house with their mother and a servant. Neither Les Vogel, Jr., nor Dorothea made any contribution to the maintenance of the home, either before or after the decedent's death. (R. 34.)

On September 7, 1950, Elizabeth Vogel filed a petition with the Superior Court of the State of California, San Francisco County, for a family allowance of \$1,500 a month from the estate of J. Leslie Vogel. On September 19, 1950, the judge of the Superior

Court entered an order granting the allowance. During the probate of the estate, checks totaling \$27,000 were paid to Mrs. Vogel as a family allowance. (R. 34.)

The decedent's will was admitted to probate and Elizabeth Vogel filed an election to take under its provisions on September 12, 1952. (R. 34-35.)

A federal estate tax return was filed on February 15, 1952. Various securities and miscellaneous assets were treated on the return as the decedent's separate property. No reference was made to certain property standing in the name of Elizabeth Vogel alone. Deductions were claimed on the return for a bequest to surviving spouse (marital deduction) of \$61,077.55 and an allowance for support of dependents (family allowance) paid to Elizabeth Vogel totaling \$27,000 (\$1,500 per month for 18 months). (R. 35.)

The Commissioner determined that the entire gross estate of the decedent and Elizabeth Vogel was community property and recomputed the tax on a community property basis. The following assets standing in the name of Elizabeth Vogel were added to the gross estate (R. 35):

4 shares Pacific Turf Club stock.....	\$1,700.00
500 shares Pacific Gas & Electric redeemable first preferred stock	7,156.25
467 shares Bank of America stock.....	6,333.69
217 shares Pacific Gas & Electric common stock	3,499.13
250 shares Leslie Financing Company.....	5,627.62
Anzavista Apartments property	8,800.00
Savings account, Marina Branch of Bank of America	1,181.74

The Commissioner decreased all expenses of administration, funeral expenses, and debts of the decedent by one-half, except \$5,400 for maintenance and upkeep of a boat, which amount was totally disallowed. (R. 35.) This disallowance of \$5,400 is not contested by the taxpayers. (R. 35-36, Br. 4.) The marital deduction was also disallowed. The family allowance was decreased from \$1,500 per month for 18 months to \$1,000 per month for the same period; one-half the total sum was permitted as a deduction. The Commissioner determined a deficiency of \$29,601.88 in the return. The Tax Court sustained the Commissioner and directed that decision be entered under Rule 50. (R. 36-44.)

The taxpayers objected to the Commissioner's computation under Rule 50 (R. 44-46), claiming that certain attorneys' fees paid to their counsel had not been deducted from the gross estate, and further, that the funeral expenses should have been deducted in full rather than deducted only to the extent of one-half (R. 47-48). The Tax Court held that the attorneys' fees were not made the subject of assignment of error and were not in the case. The Tax Court also held that the funeral expenses were properly deducted to the extent of one-half only under the community property law of California. (R. 226.) The Tax Court entered a decision approving the Commissioner's computations. (R. 49.) The taxpayers appealed from that decision. (R. 50-51.)

SUMMARY OF ARGUMENT

It is a conceded fact that all the property originally owned by the decedent and his wife, Elizabeth, was community property. All the property flowing therefrom retained the community characteristic unless there had been a transmutation. The Tax Court found that the evidence failed to establish ^{that} a transmutation took place. The Tax Court also found that the Commissioner correctly determined that the entire property of the decedent and his wife was community property. These Tax Court findings are fully supported by the record and by the statutory presumptions.

The Tax Court's finding that a family allowance of \$1,000 per month for the sole support of the widow is reasonable, is sustained by the record and by the clear reasoning of the Tax Court. Further, the taxpayers have failed to establish that a greater amount was reasonable for purposes of computing the deduction from the gross estate.

Neither the claim for the deduction for attorney fees nor the claim for the deduction in full of the funeral expenses were timely raised when asserted by the taxpayers in the Tax Court Rule 50 computation. Even if the latter issue had been timely raised, when the entire estate consists of community property, funeral expenses are deductible only to the extent of one-half.

ARGUMENT

I

The Tax Court Correctly Found That the Evidence Failed to Establish That A Transmutation Took Place and Therefore That the Commissioner Correctly Determined That the Entire Property of Decedent and His Spouse Was Community Property

The principal question upon this review is whether the Tax Court properly held that all the assets standing in the name of the decedent and all those standing in the name of Elizabeth Vogel, his wife, were community property. The Tax Court's finding that the Commissioner's determination to that effect was correct is wholly supported by the record.

We begin with the conceded fact (R. 41, Br. 16) that originally all the property owned by decedent and Elizabeth was community property. Because of this fact, the first specification of error asserted by the taxpayers (Br. 5) is that the Tax Court erred in holding that the evidence failed to establish that a transmutation took place and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property. It is fundamental that other property flowing from community property by purchase or exchange retains the character of the traceable community source. *In re Jolly's Estate*, 196 Cal. 547, 238 Pac. 353. Unless there was a transmutation from community property to separate property, the findings of the Tax Court should be sustained in their entirety. The record fails to support a finding that there was a transmutation and, in fact, the record clearly establishes the

community character of the properties whether held in decedent's name, in Elizabeth's name, or in the name of both.

Basically, under Section 164 of the California Civil Code (Appendix, *infra*), property acquired by either the husband, or the wife, or both, after marriage is presumed to be community property, and the one asserting that such property is separate has the burden of establishing that fact. *Wilson v. Wilson*, 76 Cal. App. 2d 119, 172 P. 2d 568. There is also a disputable presumption in Section 164 that if property is acquired by a married woman by an instrument in writing it is her separate property rather than community property. *Nichols v. Mitchell*, 32 Cal. 2d 598, 197 P. 2d 550. But the taxpayers are not aided by this disputable presumption because in any case concerning the question of federal estate tax upon community property the presumption that the determination of the Commissioner is correct would prevail. *Shea v. Commissioner*, 81 F. 2d 937 (C. A. 9th). In that analogous case, concerning another presumption contained in Section 164, this Court noted (*Shea v. Commissioner, supra*, p. 940):

It seems fairly clear that the action of the Commissioner shifted the burden of proof to the taxpayer to show that his action was in error. See *Gordon v. Commissioner* (C.C.A.) 75 F. 2d 429; *Pedder v. Commissioner* (C.C.A.) 60 F. 2d 866.

Secondly, as clearly recognized by this Court in *Acme Distributing Co. v. Collins*, 247 F. 2d 607 (by quotation with approval of *Nevins v. Nevins*, 129 Cal. App.

2d 150, 276 P. 2d 655), whether or not a presumption is controverted is a question of fact for the trial court and its conclusion, unless manifestly without sufficient support in the evidence, is conclusive on appeal. The conclusion of the trial court herein, adverse to the taxpayers, is wholly supported by the entire record and that record manifestly demands no other conclusion.

The taxpayers apparently continue to contend, as they did below, that a transmutation of the community property to separate property took place by oral agreement between the decedent and Elizabeth. Where one spouse is dead, contentions that there had been an oral agreement of transmutation must be subjected to the most careful scrutiny. *In re Henderson's Estate*, 128 Cal. App. 397, 17 P. 2d 786. If a transmutation agreement had been arrived at its existence would necessarily have been within the knowledge of Elizabeth. As the Tax Court pointedly observed, Elizabeth, although testifying at length for the taxpayers, at no time was asked whether a transmutation agreement had ever been discussed by her and her husband or if such an agreement existed. Accordingly, the natural inference is that if such evidence had been produced it would be unfavorable. *Wichita Term. El. Co. v. Commissioner*, 6 T. C. 1158, affirmed, 162 F. 2d 513 (C. A. 10th).

Although taxpayers assiduously avoid pin-pointing the exact date in the brief on appeal, it was clear below that their position was that the transmutation took place on January 1, 1943, the date from which the partnership terms ran as provided in the partner-

ship agreement executed on February 6, 1943.¹ (R. 19, 27, 36). Certainly the fact that in December, 1942, decedent, to avoid the application of the excess profits tax and to admit his son, Les Vogel, Jr., into the business, dissolved the corporation and formed a limited partnership did not result in the transmutation of the corporation. Merely because Elizabeth became a limited partner in the Chevrolet business on February 6, 1943, does not mean that her interest became separate property, inasmuch as naked legal title is of little value in resolving the matter of whether property is community or separate. *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905. Nor does a partnership agreement between a husband and wife alone transmute community property into separate property. *Van Vorst v. Commissioner*, 7 T. C. 826. Since a partnership agreement alone is not a vehicle of transmutation, a specific agreement to change the nature of property must be expressly found in the partnership agreement, in order to transmute property. *McCall v. McCall*, 2 Cal. App. 2d 92, 37 P. 2d 496. No evidence of such an agreement is in the record. (Cf. R. 39.) Without such, the investment of community assets in the partnership remains community property, and the later

¹ The exact date assumes considerable relevance because of Section 812(e) (2) (C) (i) of the Internal Revenue Code of 1939 (Appendix, *infra*) which provides that a transmutation of community property during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948 (April 2, 1948) is still considered as community property for purposes of computation of a marital deduction.

transfer of the investment from the partnership to the corporation does not change its status. *In re Kane's Estate*, 80 Cal. App. 2d 256, 181 P. 2d 751.

Furthermore, the true nature of the Chevrolet partnership is evidence from the treatment upon dissolution and reincorporation of the business on November 1, 1946. The opening balance sheet for the corporation showed accounts payable in the name of the decedent and Elizabeth in the sum of \$105,382.15. The sum necessary to bring each of the partnership accounts up to \$50,000 was taken from the accounts payable and one third of the stock was issued to each of the former partners. In addition, the separate drawing accounts of the decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of the decedent, along with other items, were charged against this account. (R. 20-22, 27-29.)

The taxpayers also claim support for their position from the treatment of the property by the decedent and from the statements of Robert G. Partidge, his personal attorney. The treatment by the decedent of the property is clearly evidenced by his will executed on December 13, 1946, and admitted to probate following his death, which clearly recited that "All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property". (R. 32.) Prior to the drafting of the first will by him, Partidge had taken notes during a discussion with the decedent, and those notes included the words "Trans-

mutation Agreement (January 1, '43)". (R. 117-118.) Partridge testified he had no independent knowledge on this subject and could only conclude at this late date that he wrote down information communicated to him by the decedent. (R. 120-121.) Partridge also testified that at no time during their discussions concerning the first will did the decedent show Partridge any written agreement which would have transmuted community to separate property. The decedent was unable to explain to Partridge why Elizabeth's interest in the Chevrolet Company was her separate property. (R. 40, 138-141.) In short, Partridge stated that he did not know in fact if there ever was a transmutation. (R. 40, 141, 142, 201.)

A second will had been drafted for the decedent in 1950 but it was never signed. A draft of a will for Elizabeth had been prepared at approximately the same time. As the Tax Court noted, both referred to "a written agreement transmuting community property to separate property, but no direct evidence of such a written agreement was introduced at the trial." (R. 39, 117-118, 120-121.)²

At the time of drafting the second will Partridge had suggested to the decedent that it would be best to have some expression of a transmutation agreement in writing. But, as the Tax Court found, "No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual

² Partridge and the decedent never discussed the transmutation of any property other than the Les Vogel Chevrolet Company. (R. 33, 138.)

existence of such an agreement, either oral or written." (R. 33.) The taxpayers take exception to the above-quoted portion of the findings (Br. 13) and refer to a portion of Partridge's testimony as supporting and establishing that such an agreement existed. The taxpayers do not take exception to the further finding that Partridge did not know in fact whether there ever was a transmutation. (R. 34.) Partridge admitted he had no knowledge of *any* agreement relative to the transmutation of community property to separate property. (R. 141.) Despite this admission by Partridge, the decedent's personal attorney for 15 years (R. 111-112), the taxpayers claim (Br. 13-14) that he testified to the "actual existence" of such an agreement and make reference to portions of his testimony (R. 138-139). Examination of the quoted portion discloses that Partridge himself assumed it had been done in the first place and consistently hedged throughout his testimony as to the actual existence of a transmutation agreement. Thus it becomes clear that the taxpayers' exception is without foundation.

Although the unexecuted second will referred to a written transmutation agreement, the existence of this writing was never established and the Tax Court properly inferred that if such an agreement was contemplated it had not reached accomplishment at the time of the decedent's death. Thus, the Tax Court properly concluded that the taxpayers failed to show that a transmutation took place. Since the taxpayers concede that all the property originally owned by the decedent and Elizabeth was community property, all

the assets standing in the name of the decedent or in the name of Elizabeth, including the Chevrolet property, must be regarded as community property.³

Among the additional facts supporting the Tax Court findings are those concerning the treatment by the decedent and Elizabeth of dividends and gains and losses upon the sale of securities. Historically, the dividends were divided between decedent and Elizabeth. Significantly, the treatment was the same whether the stock was registered in the decedent's name or in Elizabeth's name or in both names jointly. This was also true with respect to the capital gain or loss on the sale of such securities. The decedent and Elizabeth always equally divided the dividends from the Les Vogel Chevrolet Company. On the 1947 federal income tax returns the capital gains on the sale of securities were described as community. On the 1947 state returns the total income reported was characterized as community. Upon the advice of attorneys, the decedent's and Elizabeth's dividends were segregated for the first time on the 1950 state tax returns filed after the decedent's death. (R. 24-25, 31-32.)

Even assuming *arguendo* that there had been a transmutation of the Chevrolet Company, all other property, including that held in Elizabeth's name, might still have been acquired with community funds, thereby retaining their community character. *In re Jolly's Estate, supra*. In this connection, no conten-

³ The pleadings raised no issue as to jointly held property. (R. 12, 42.)

tion was ever made that the salary payments to the decedent were transformed into separate property. The decedent's salary was about \$1,800 per month (R. 34) and with bonuses aggregated in excess of \$30,000 per year (R. 101).

The decedent's salary checks were deposited in various bank accounts maintained by decedent and Elizabeth. A checking account was maintained in the name of Les or Elizabeth Vogel. Two savings accounts were maintained in the name of decedent and Elizabeth. One savings account was in the name of Elizabeth. (R. 23, 29.)

As previously mentioned, the separate drawing accounts of the partnership were combined into one account on the corporate books against which were charged various investments of the decedent. In October, 1947, one half of the remaining balance of the combined account was deposited in the savings account in the name of Les or Elizabeth Vogel, and subsequently withdrawn. The other half was deposited in the savings account in the name of Elizabeth. Some of decedent's salary checks were also deposited in the account in Elizabeth's name. The amounts were subsequently transferred to the checking account in the name of Les or Elizabeth Vogel. (R. 23, 29.)

The principal deposits to the other savings account in both names were the decedent's salary checks. Elizabeth made most of these deposits and as a practice retained \$100 to \$300 from the checks for household expenses. Transfers were made from this account to the checking account. (R. 24, 30.)

A number of salary checks were deposited directly into the checking account, held in the name of Les or Elizabeth Vogel. The decedent made payments out of this account for investments in Elizabeth's name as well as for his own individual expenditures and for joint living expenses. Payment for 467 shares of Bank of America stock standing in Elizabeth's name was also made from the checking account. Investments in a separate brokerage account maintained since 1948 in Elizabeth's name were paid for from the checking account. The decedent's separate brokerage account had been opened in 1946. The decedent's purchases during 1946 and 1947 were charged to his partnership drawing account prior to the dissolution and thereafter to his and Elizabeth's drawing account on the corporation's books. (R. 23, 24, 30.) It is apparent from the foregoing that unquestioned community property in the form of decedent's salary was, at best, so commingled with other funds, whatever their nature, that tracing is impossible. The whole, therefore, will be treated as community property and all property acquired therefrom should be deemed community. *Pedder v. Commissioner*, 60 F. 2d 866 (C. A. 9th); *Fountain v. Maxim*, 210 Cal. 48, 290 Pac. 576.

Finally, during a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista apartment property as decedent's. (R. 31, 198.) She further represented that whatever property she and decedent had belonged to both of them. (R. 31, 199, 209.) At the trial, Eliza-

beth stated that the Anzavista property "was the whole family's." (R. 31, 175.)

In brief, the record is devoid of any evidence supporting a transmutation from community property to separate property. Additionally the record completely supports the findings of the Tax Court and, in fact, compels no other conclusion than that all the property in question was community property.

II

The Taxpayers Have Failed To Demonstrate That An Amount In Excess of the \$1,000 Per Month for 18 Months Was Reasonable and Proper In Ascertaining the Deduction for Family Allowance

The taxpayers complain of the Tax Court's conclusion that the family allowance should be limited to \$1,000 per month for 18 months. Significantly, this contention is made with a complete failure of attack upon the Tax Court's reasoning. The taxpayers had claimed a deduction for \$1,500 per month for 18 months, which amount had been allowed by the state probate court. After careful consideration of the matter, the Commissioner determined that the proper family allowance was \$1,000 per month for 18 months and permitted deduction of one half of the total. (R. 15.) The Tax Court sustained the Commissioner.

Section 812(b)(5) of the Internal Revenue Code of 1939 (Appendix, *infra*), as effective for the period herein involved,⁴ provides for a deduction from the

⁴ This section was repealed by Section 502(c) of the Revenue Act of 1950 but the change was effective with respect

gross estate of the amounts actually expended and "reasonably required", during settlement of the estate, for the support of those dependent upon the decedent. *Estate of Jacobs v. Commissioner*, 8 T. C. 1015. In the determination of the proper amount deductible for this purpose the test is not what the state probate court may have allowed but rather what amounts are reasonably required within the meaning of the federal statute. *Buck v. Helvering*, 73 F. 2d 760 (C. A. 9th); *Estate of McIntosh v. Commissioner*, 25 T. C. 794, affirmed on other grounds, 248 F. 2d 181 (C. A. 2d) certiorari denied, 355 U. S. 923; *Estate of Hanch v. Commissioner*, 19 T. C. 65. In this regard, Section 81.40 of Treasury Regulations 105 (Appendix, *infra*) limits the deduction to an amount not in excess of what is reasonably required.

The Tax Court noted that the decedent spent most of his monthly salary of \$1,800 in maintaining his home. (R. 43.) However, the Tax Court cautioned, decedent had been providing maintenance for himself, his wife, and two adult children⁵ whereas the allowance during the settlement of the estate was for the support only of the widow. Accordingly, the Tax Court reasoned that if the family of four was adequately maintained during decedent's life on \$1,800 per month it followed that the Commissioner's allow-

to estates of decedents dying after September 23, 1950, the date of enactment of the Revenue Act of 1950. Decedent herein died on August 16, 1950.

⁵ The family allowance is not available to adult children unless incompetent. (California Probate Code, Section 680.)

ance of \$1,000 per month for the maintenance of the widow alone was adequate and reasonable for her support in the manner to which she had been accustomed. The taxpayers do not attack this reasoning of the Tax Court. In light of the fact that there was little evidence of the actual cost of maintaining the home either before or during the settlement of the estate (R. 44), this reasoning, we submit, is eminently correct.

The taxpayers' citation of two other Tax Court cases finding that under the particular facts of those cases certain amounts were reasonable does not avoid the finding by the Tax Court in this case that \$1,000 per month was reasonable. This finding is wholly supported by the record, by the statute, by the regulation, and by the clear reasoning of the Tax Court. Not only is this finding of fact not clearly erroneous, but the taxpayers have failed to show that a greater amount was reasonable and proper.

III

The Deduction for Attorney Fees Was Not Properly Put in Issue, and Could Not Have Been Raised As A New Issue Under the Tax Court Rule 50 Computation

When the opportunity arose for objecting to the Commissioner's computation under Tax Court Rule 50 (Appendix, *infra*), the taxpayers claimed a deduction for attorney fees in the amount of \$1,000. (R. 47.) It has been long established that the only issues that may be raised on a hearing under Rule 50 are those that are strictly confined to the correct

computation of the deficiency resulting from the decision, and that no new issue may be raised. Tax Court Rule 50(c); *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 312-313; *Fifth Street Bldg. v. Commissioner*, 77 F. 2d 605, 608-609 (C. A. 9th); *Commissioner v. Superior Yarn Mills*, 228 F. 2d 736 (C. A. 4th); *Shanis v. Commissioner*, 213 F. 2d 151 (C. A. 3d); *Davison v. Commissioner*, 60 F. 2d 50 (C. A. 2d). In complete accord with these principles, the Tax Court did not permit a deduction of the attorney fees because these fees "were not made the subject of assignment of error." (R. 226.)

There is no question but that a deduction for attorney fees, paid by the estate in contesting a deficiency in tax, is allowable when proved to be reasonable and provided that it is claimed at the proper point in the proceeding. That in the instant case the attorney fees deduction was not timely claimed is apparent from Treasury Regulations 105, Section 81.34, which in pertinent part expressly provides that:

A deduction for attorneys' fees incurred in contesting an asserted deficiency or prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted.

No deduction was claimed herein at the time the notice of deficiency was given nor at the time the petition for redetermination was filed. Yet, even accepting the liberal construction placed upon the Regulations by *Bohnen v. Harrison*, 232 F. 2d 406 (C. A. 7th), and applying such a liberal construction

to a deficiency case, it is clear that, at the latest, the deduction would have had to be claimed by the time of filing the petition. That was not done here. (R. 5-8.)

Neither *Estate of Tillotson v. Commissioner*, 44 B. T. A. 644, nor *Leewitz v. United States*, 75 F. Supp. 312 (C. Cls.), certiorari denied *sub nom.*, *Leeds v. United States*, 335 U. S. 820, support the taxpayers for in both cases no question was raised as to the timeliness since attorney fees had been claimed in the returns. At the trial the taxpayers were apprised by the Commissioner's counsel that no issue was raised in the pleadings with regard to attorney fees (R. 185) at a time when the situation could have been remedied by amending their petition under Tax Court Rule 17 (Appendix, *infra*). However, the taxpayers failed to do so and therefore are not entitled to the deduction asserted for attorneys fees.⁶

Additionally, whether the attorney fees paid were reasonable and were paid on behalf of the estate was not satisfactorily established by the bare testimony of the decedent's son, Les Vogel, Jr. (R. 186-188.) There would have been adequate opportunity to establish such facts if the amendment to the petition had been made. If the parties had then been unable to agree under Rule 50, Tax Court Rule 51 (Appendix, *infra*) would have permitted the taxpayers to reopen the case for further trial on that issue. For these various reasons, the Tax Court correctly

⁶ The claim for attorney fees in an additional amount (Br. 27) falls along with the claim for the \$1,000.

held that the attorney fees “are not in the case”. (R. 226.)

IV

The Taxpayers Untimely Raised An Issue, in the Course of the Tax Court Rule 50 Computation, Concerning the Deductibility of Funeral Expenses in Full When the Entire Estate Consists of Community Property, and Further, the Deduction Was Properly Limited to One-Half of the Amount of Funeral Expenses

During the course of the Rule 50 computation, the taxpayers also attempted to raise a new issue as to the amount of the deduction for funeral expenses. (R. 47.) Since the entire estate had been determined to be community property, the Commissioner had allowed only one-half of the funeral expenses as a deduction from the gross estate. (R. 13.) The Tax Court sustained this determination. (R. 226.) Even though admitting that the claim for the *full* amount of the funeral expenses as a deduction was not raised in the pleadings (Br. 28), the taxpayers maintain that they are entitled to relief on this untimely issue.⁷ However, the various authorities cited in Point III, *supra*, apply with equal force here, compelling the conclusion that this issue is not in the case.

Even assuming, *arguendo*, that the issue of the deduction of funeral expenses in full had been timely

⁷ We assume that taxpayers' Point IV is directed solely to the fourth specification of error (Br. 5), and note, as a matter of clarification, that even as late as the Rule 50 computation the taxpayers made no objection whatsoever with regard to any item other than attorney fees and funeral expenses (R. 47).

raised, the taxpayers rely wholly upon *Estate of Lee v. Commissioner*, 11 T. C. 141, which is limited by its very terms to Idaho law. However, Section 202 of the Probate Code of California (Appendix, *infra*) expressly provides that "Community property passing from the control of the husband, either by reason of his death * * * is subject to his debts and to administration and disposal under the provisions of Division 3 of this Code; . . ." Accordingly, the costs of administration, the debts of the husband and the family allowance are chargeable against the entire community property. *In re Coffee's Estate*, 19 Cal. 2d 248, 120 P. 2d 661; *In re Hirsch's Estate*, 122 C. A. 2d 822. See *United States v. Merrill*, 211 F. 2d 297, 301 (C. A. 9th). It is clear that funeral expenses are encompassed within Probate Code Section 202 for the wife's share will not be charged for the payment of such debts if the husband provides otherwise by will. *In re Chanquet's Estate*, 184 Cal. 307, 193 Pac. 762; *In re Marinos' Estate*, 39 Cal. App. 2d 1, 7, 102 P. 2d 443, 446-447. In *United States v. Merrill*, *supra*, p. 301, this Court noted that in California, as in Washington, the entire community property is subject to the community debts and expenses of administration where, as here, the husband predeceased the wife. In the instant case, as in *Lang v. Commissioner*, 97 F. 2d 867 (C. A. 9th), a case arising in Washington, only one-half of the funeral expenses is deductible from the gross estate when the entire gross estate is community property.

CONCLUSION

It is submitted that the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

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JOHN J. PAJAK,
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AUGUST, 1959

APPENDIX

California Civil Code:

Sec. 162. *Separate property; wife.*

SEPARATE PROPERTY OF THE WIFE. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. (Enacted 1872.)

Sec. 164. *Community property; presumptions as to property acquired by wife; limitation of actions.*

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the

presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

California Probate Code:

SEC. 202. Death of husband, property subject to debts and administration, disposal; death of wife, husband's powers and duties relating to property

Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division 3 of this code; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. (Stats. 1931, c. 281, p. 596, Sec. 202.)

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or

personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest*.—To the extent of the interest therein of the decedent at the time of his death;

* * * *

(26 U.S.C. 1052 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(b) *Expenses, Losses, Indebtedness, and Taxes*.—Such amounts—

- (1) for funeral expenses,
- (2) for administration expenses,

* * * *

(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered,
* * *

* * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse*.—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * *

(H) *Limitation On Aggregate Of Deductions.*—The aggregate amount of the deductions allowed under this paragraph (computed with regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.*—

(A) *General Rule.*—Except as provided in subparagraph (b) of this paragraph the adjusted gross estate shall, for the purposes of paragraph (1) (H), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by subsection (b) of this section.

(B) *Special Rule In Cases Involving Community Property.*—If the decedent and his surviving spouse at any time held property as community property under the law of any State, Territory, or possession of the United States, or

of any foreign country, then the adjusted gross estate shall, for the purposes of paragraph (1) (H), be determined by subtracting from the entire value of the gross estate the sum of:

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies upon the life of the decedent to the extent purchased with premiums or other consideration paid out of property held as such community property; and

(iv) an amount which bears the same ratio to the aggregate of the deductions allowed under subsection (b) of this section which the value of the property included in the gross estate, diminished by the amount subtracted under clauses (i), (ii), and (iii) of this subparagraph, bears to the entire value of the gross estate.

For the purposes of clauses (i), (ii), and (iii) community property (except property which is considered as community property solely by reason of the

provisions of subparagraph (C) of this paragraph) shall be considered as not "held as such community property" as of any moment of time, if, in case of the death of the decedent at such moment, such property (and not merely one-half thereof) would be or would have been includible in determining the value of his gross estate without regard to the provisions of section 811 (e) (2). The amount to be subtracted under clause (i), (ii), or (iii) shall not exceed the value of the interest in the property described therein which is included in determining the value of the gross estate.

(C) Same—Conversion Into Separate Property—

(i) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form of co-ownership by them), the separate property so acquired by the decedent and any property acquired at any time by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii),

and (iii) of subparagraph (B), be considered as "held as such community property".

(ii) Where the value (at the time of such conversion) of the separate property so acquired by the decedent exceeded the value (at such time) of the separate property so acquired by the decedent's spouse, the rule in clause (i) shall be applied only with respect to the same portion of such separate property of the decedent as the portion which the value (as of such time) of such separate property so acquired by the decedent's spouse is of the value (as of such time) of the separate property so acquired by the decedent.

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105; promulgated under the Internal Revenue Code of 1939:

SEC. 81.34 [As amended by T. D. 5596, 1948-1 Cum. Bull. 127] *Attorney's fees*.—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reason-

able remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

Attorney's fees incurred by beneficiaries incident to litigation as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charged against the beneficiaries personally and are not administration expenses.

SEC. 81.40 *Support of dependents.*—The support of dependents of the decedent during the settlement of the estate is deductible pursuant to the following rules:

(a) In order to be deductible, the allowance must be authorized by the laws of the jurisdiction in which the estate is being administered, and not in excess of what is reasonably required.

(b) The allowance for which deduction may be made is limited to support during the settlement of the estate. Any allowance for a more extended period is not deductible.

(c) There must be an actual disbursement from the estate to the dependents, but after pay-

ment has been made the right of deduction is not affected by the fact that the dependents do not expend the entire amount for their support during the settlement of the estate.

Rules of Practice of the Tax Court of the United States (Rev. 1958):

RULE 17. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) *General*.—A motion for leave to amend a pleading shall state reasons for granting it and shall be accompanied by the proposed amendment.

(b) *Petition*.—

(1) *Before answer*.—The petitioner may amend his petition at any time before answer is filed.

(2) *After answer*.—A petition may be amended, after answer is filed and up to the commencement of the trial, only with the consent of the Commissioner or by leave of the Court.

(c) *Amendment ordered*.—

(1) *Occasion for*.—The Court upon its own motion, or upon motion of either party showing good cause filed prior to the setting of the case for trial, may order a party to file a further and better statement of the nature of his claim, of his defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired.

(2) *Consideration of such motion.*—The Court, in its discretion, may set such a motion for hearing (see Rule 27 (a) or may act upon it *ex parte*.

(3) *Penalty for failure to amend.*—The Court may strike the pleadings to which the motion was directed or make such other order as it deems just, if an order of the Court to file amended pleadings hereunder is not obeyed within 15 days of the date of the service of said order or within such other time as the Court may fix.

(d) *To conform pleadings to proof.*—The Court may at any time during the course of the trial grant a motion of either party to amend its pleadings to conform to the proof in particulars stated at the time by the moving party. The amendment or amended pleadings thus permitted, shall be filed with the Court at the trial or shall be filed in the office of the Clerk of the Court in Washington, D. C., within such time as the Court may fix. (See Rules 4, 5, and 19.)

* * * *

RULE 50. COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION

(a) *Agreed computations.*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to

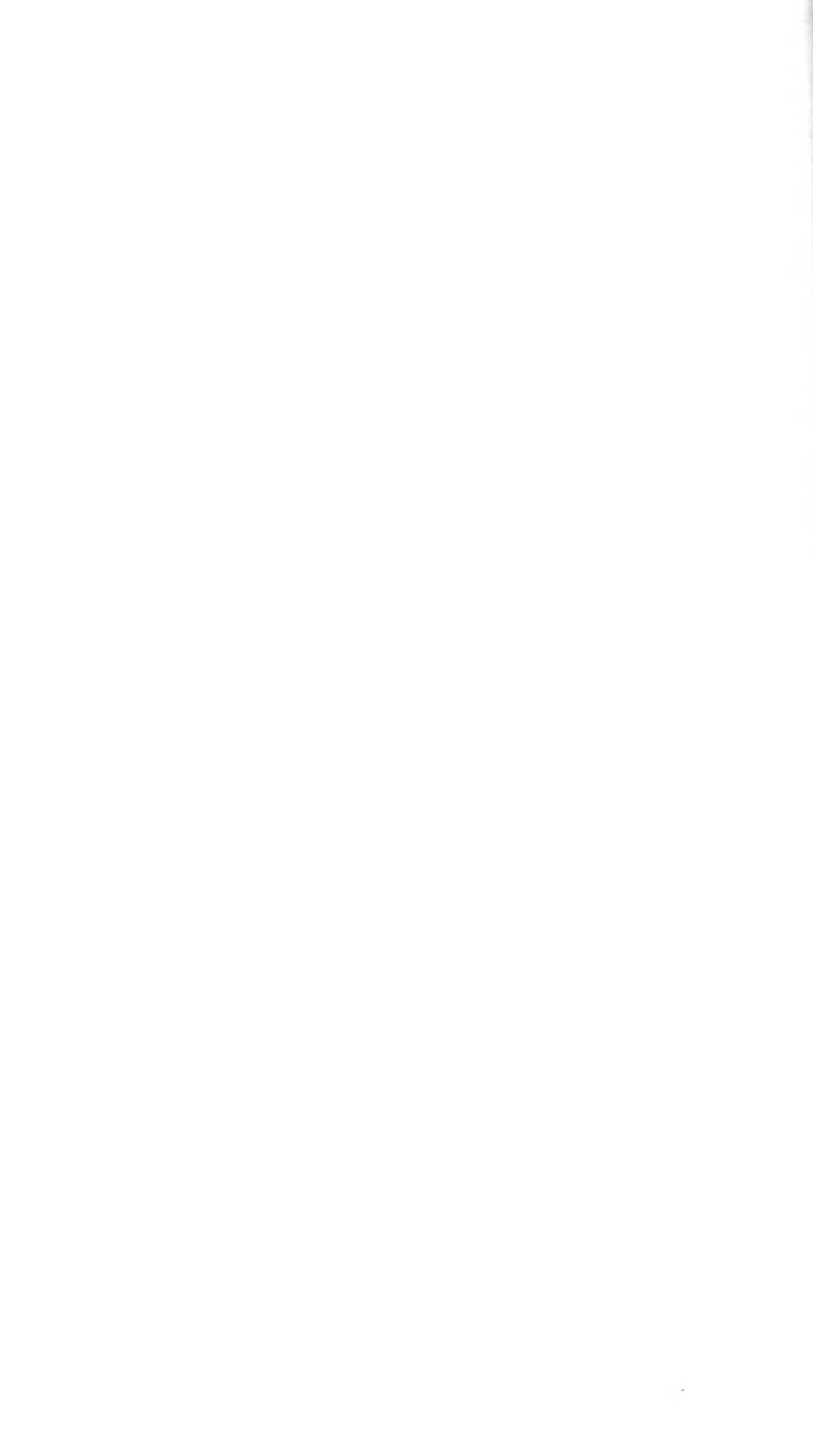
the report of the Court, they or either of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

(b) *Procedure in absence of agreement.*—If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least 5 days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

RULE 51. ESTATE TAX DEDUCTION DEVELOPING AFTER TRIAL

If the parties in an estate tax case are unable to agree under Rule 50, or under a remand, upon

a deduction involving expenses incurred at or after the trial, the petitioner may move to reopen the case for further trial on that issue provided it is raised in the petition or by amendment thereto.



No. 16,304

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ESTATE OF J. LESLIE VOGEL, ROBERT G.
PARTRIDGE and ELIZABETH S. VOGEL,
Executors,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**On Petition for Review of the Decision of the
Tax Court of the United States.**

REPLY BRIEF FOR PETITIONERS.

GRANT G. CALHOUN,
1017 Macdonald Avenue, Richmond, California,
Attorney for Petitioners.

FILED

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U. S. DEPT. OF JUSTICE, CLERK

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

REPLY BRIEF FOR PETITIONERS.

REPLY TO ARGUMENT OF RESPONDENT THAT THE EVIDENCE
FAILED TO ESTABLISH THAT A TRANSMUTATION TOOK
PLACE AND THEREFORE THAT THE COMMISSIONER COR-
RECTLY DETERMINED THAT THE ENTIRE PROPERTY OF
DECEDENT AND HIS SPOUSE WAS COMMUNITY PROPERTY.

Respondent in his brief argues that the disputable
presumption in Section 164 of the California Civil
Code, that if property is acquired by a married woman
by an instrument in writing it is her separate prop-
erty rather than community property, is not sufficient
to overcome the presumption that the determination

of the commissioner is correct. Standing alone there may be some merit to this contention. However, in the case at bar there was positive evidence that the parties treated their respective properties as separate property. While it is true that Elizabeth Vogel was never asked the legal conclusion whether she and decedent had ever entered into a transmutation agreement, she did testify to the facts that certain properties in her name were her own. (R. 165-171 incl.) Her testimony was corroborated by the manner in which such properties were segregated. Furthermore decedent's discussions with his attorney give additional weight to her testimony. Her son, Les Vogel, Jr. also testified to his familiarity with the treatment accorded the properties by Mrs. Vogel and decedent. (R. 88-103 incl.)

In this connection it should be noted that the probated will of decedent in Paragraph Fourth only included as community property such property standing in the name of decedent or decedent and his wife, either as tenants in common or as joint tenants. (R. 21.) It did not include property standing in the name of Elizabeth Vogel alone.

The record clearly supports a transmutation of the property in controversy from community property to separate property of the surviving spouse.

**REPLY TO ARGUMENT THAT TAXPAYERS HAVE FAILED TO
DEMONSTRATE THAT AN AMOUNT IN EXCESS OF \$1,000.00
PER MONTH FOR 18 MONTHS WAS REASONABLE AND
PROPER IN ASCERTAINING THE DEDUCTION FOR FAMILY
ALLOWANCE.**

Respondent's brief stresses the argument that the family allowance is not for support of adult children and therefore the surviving spouse should not be entitled to an allowance for such purpose. However it is not disputed that she should be allowed an adequate and reasonable amount for her support in the manner to which she had been accustomed. She had been accustomed to having her unmarried children living with her as well as a maid "living in". Certainly having her unmarried children living with her constituted a manner to which she was accustomed as much as did her employment and support of a maid. Respondent's assertion that taxpayer does not attack the reasoning of the Tax Court in this regard is erroneous.

**REPLY TO RESPONDENT'S ARGUMENT THAT THE DEDUCTION
FOR ATTORNEY FEES WAS NOT PROPERLY PUT IN ISSUE
AND COULD NOT HAVE BEEN RAISED AS A NEW ISSUE
UNDER THE TAX COURT RULE 50 COMPUTATION.**

Respondent cites the pertinent part of Treasury Regulations 105, Section 81.34 as follows:

"A deduction for attorneys' fees incurred in contesting an asserted deficiency or prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted."

Of course no deduction was claimed at the time the notice of deficiency was given or the petition for redetermination was filed because this counsel was not employed at the time.

However the matter was raised at the time such deficiency was contested at the trial (R. 186, 187) and counsel for respondent cross-examined the witness who testified as to such payment of attorney fees.

In *Hormel v. Helvering*, 312 U.S. 552, 85 L.Ed. 1037, the Supreme Court of the United States stated on pages 556 and 557 as follows:

“... But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law ‘as justice may require.’ There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair v. Oesterlein Mach. Co.* 275 US 220, 225, 72 L ed 249, 252, 48 S Ct 87.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.” . . .

The same reasoning applies to the attorney fees claimed as a deduction for the prosecution of this appeal.

REPLY TO RESPONDENT'S ARGUMENT THAT THE TAXPAYERS UNTIMELY RAISED AN ISSUE, IN THE COURSE OF THE TAX COURT RULE 50 COMPUTATION, CONCERNING THE DEDUCTIBILITY OF FUNERAL EXPENSES IN FULL WHEN THE ENTIRE ESTATE CONSISTS OF COMMUNITY PROPERTY, AND FURTHER, THE DEDUCTION WAS PROPERLY LIMITED TO ONE-HALF OF THE AMOUNT OF FUNERAL EXPENSES.

The reply to respondent's argument in re attorney fees is likewise applicable to the question of law involved as to funeral expenses.

In California funeral expenses are not debts of decedent nor are they administration expenses. They are debts of the estate. (*Cornitius Estate* (1957), 154 C.A. 2d 422, 316 P. 2d 438.)

Unfortunately counsel for petitioners has been unable to find any federal cases involving deductibility of funeral expenses as to decedents' estates in California. The cases cited are Washington cases. (*U. S. v. Merrill*, 211 F. 2d 297 and *Lang v. Commissioner*, 97 F. 2d 867.) The distinction is that in Washington the marital community is treated as an entity while in California it is not.

It is respectfully submitted that the Tax Court was in error in the specifications set forth by petitioners.

Dated, Richmond, California,
September 14, 1959.

GRANT G. CALHOUN,
Attorney for Petitioners.



No. 16305 /

**United States
Court of Appeals**
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

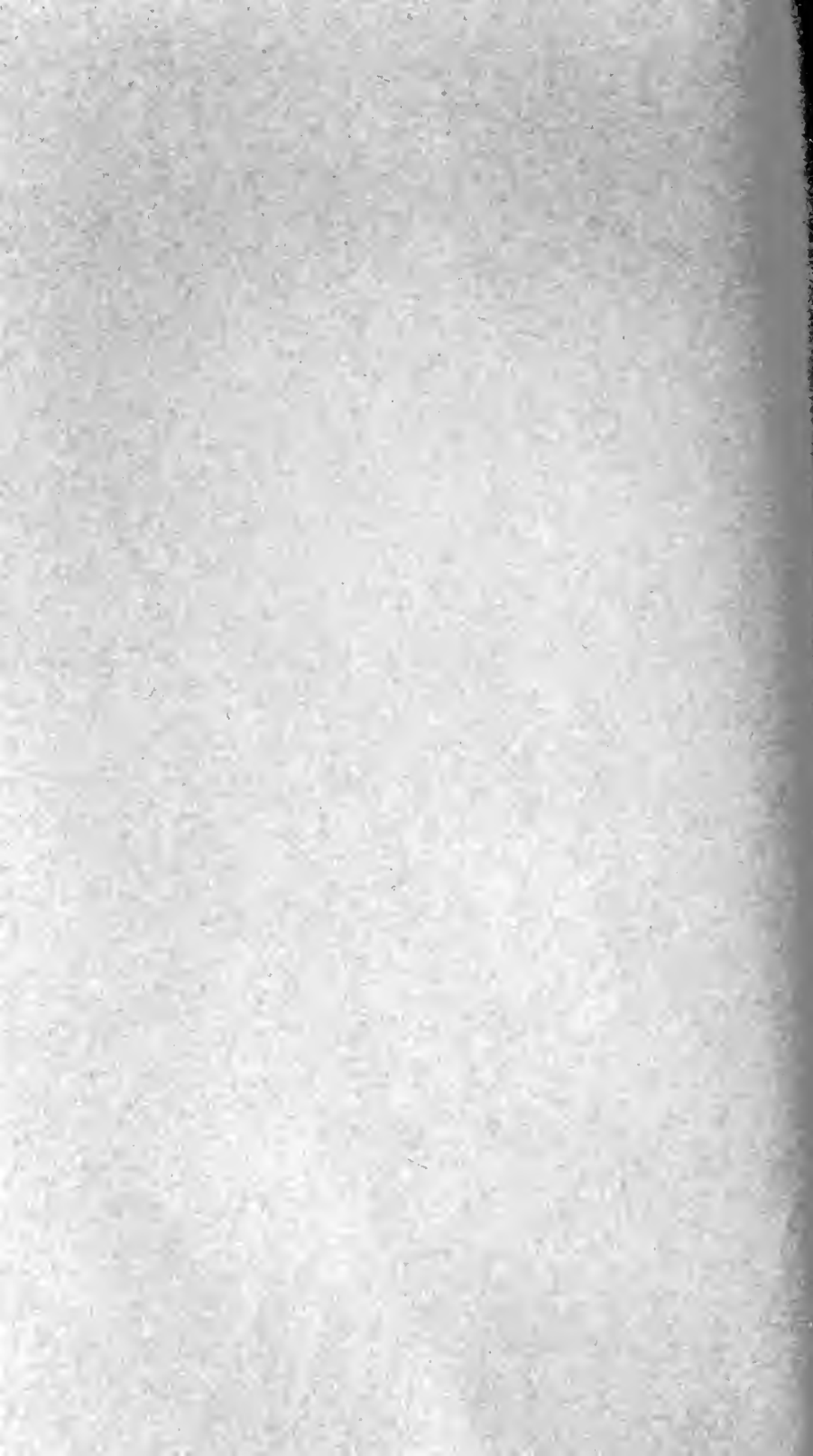
Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

FEB 19 1959

PAUL P. O'BRIEN, CLERK



No. 16305

United States
Court of Appeals
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellee.



In the District Court of the United States
for the District of Oregon

Civil No. 9258

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff and for cause of action
against the defendant, complains and alleges as fol-
lows:

I.

This action arises under the Act of Congress of
June 25, 1948, Ch. 646, Sec. 1346; 62 Stat. 992;
U.S.C., Title 28, Sec. 1346 as amended by the Act of
Congress of April 25, 1949, Ch. 92, Sec. 2 (a); 63
Stat. 62; U.S.C., Title 28, Sec. 1346; and as further
amended by the Act of Congress of May 24, 1949,
Ch. 139, Sec. 80 (a, b); 63 Stat. 101; U.S.C., Title
28, Sec. 1346, as hereinafter more fully appears.

II.

That plaintiff, during all times herein mentioned,
was and now is a bona fide resident and citizen of
the State of Oregon, within the jurisdiction of the
above-entitled court. That plaintiff is the duly ap-
pointed, qualified and acting administratrix of the

estate of William Orvie Humphreys, deceased, and is bringing this action on behalf of herself as widow and the minor children of the deceased: James, 13; William L., 11; Thomas, 10; Robert, 6; Jerry, 5; Rachael, 2.

III.

That during all times herein mentioned the United States Department of Agriculture, Administrative Subdivision of the United States of America, through its Forest Service Department, did maintain a lookout and fire prevention station at Cove Mountain Lookout, ten miles southeast of Plainview, Arkansas.

IV.

That on the 24th day of May, 1956, Richard Humphreys, the brother of the deceased, William Orvie Humphreys, entered into an agreement with the defendant whereby Richard Humphreys was to clean out a well, 47 feet in depth, at Cove Mountain Lookout and in the performance of said work did inhale certain poisonous gasses located in the bottom of the well and did call out for help. That pursuant to this summons for assistance, the decedent William Orvie Humphreys did enter into the well and attempted to rescue and remove Richard Humphreys from the well. That as a result of the inhalation of said gasses both Richard Humphreys and Orvie Humphreys succumbed and died.

V.

That as a result of said attempted rescue and as a result of the negligence of the defendant as herein-

after set forth the said William Orvie Humphreys received severe injuries which resulted in his death on May 24, 1956. That at the time of his death, William Orvie Humphreys was 37 years of age, with the normal life expectancy of 28.53 and earning and capable of earning not less than \$4,500.00 a year. That by virtue of his death, the surviving widow and next of kin have suffered damages therefore in the sum of \$84,000. As approximate result of the death, William Orvie Humphreys and of the defendant's negligence set forth above, the plaintiff was compelled to and did incur and pay funeral expenses in the sum of \$400.00.

VI.

That said accident and the injuries and damages suffered by the decedent were proximately caused by the careless and negligent acts of John H. Lancaster, employee of the defendant, in the following particulars:

(a) In failing to advise Richard Humphreys or William Orvie Humphreys that there had been a known leakage of poisonous gasses in the well on other previous occasions.

(b) In failing to provide a safe method of ingress and egress to the bottom of the well.

(c) In failing to station other persons on the ground at the top of the well to assist persons out of the well in the event of an emergency.

VII.

That Arkansas Statutes, Sections 27.903 and 27.904 provide that an action for death may be maintained by the personal representative, or if none exists, by an heir, for the benefit of the widow and next of kin.

VIII.

The Constitution of the State of Arkansas, Article V, Section 32, provides that damages for death may not be limited.

IX.

That at and prior to the time of said accident, the said John Lancaster was acting within the scope of his employment as a lookout station operator of the United States Forest Service, an agency of the defendant. That the death of William Orvie Humphreys resulted from the negligence of the defendant's said employee under circumstances where the United States, if a private person, would be liable to plaintiff for damage and injury in accordance with the laws of the State of Arkansas.

X.

Plaintiff has retained Luvaas & Cobb as her attorneys to represent her in this cause, and a reasonable compensation for their services, to be paid out of, and not in addition to, the sum of the judgment, would be twenty per cent (20%) of the amount of plaintiff's recovery herein.

Wherefore, Plaintiff demands judgment against defendant in the sum of \$84,000 together with costs, and prays that the court fix and allow attorney's

fees of twenty per cent (20%) of the amount recovered.

LUVAAS & COBB,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

Civil No. 9258

ANSWER

Comes now the defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, and for answer to the complaint on file herein alleges:

First Defense

The venue of this action does not lie in the United States District Court for the District of Oregon, but on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Eastern District of Arkansas, for the following reasons, to wit:

1. This is a civil action on a tort claim against the United States under subsection (b) of Section 1346 of Title 28, USCA.

2. That plaintiff brings this action as the personal representative of the decedent, William Orvie Humphreys, who at the time of his death was a resident of Hollis, Arkansas.

3. That the act or omission complained of in plaintiff's complaint occurred in the Eastern District of Arkansas.

Second Defense

1. Defendant admits the allegations contained in Paragraphs I, II and III of the complaint.

2. Defendant admits that part of Paragraph IV of the complaint which alleges that on May 24, 1956, Richard Humphreys, the brother of the deceased William Orvie Humphreys, entered into an agreement with the defendant whereby Richard Humphreys was to clean out a well, but denies all other allegations of Paragraph IV.

3. The defendant denies the allegations contained in Paragraphs V and VI of the complaint and particularly denies that the plaintiff was damaged in any sum whatever.

4. Defendant admits Paragraphs VII and VIII of the complaint.

5. Defendant admits that part of Paragraph IX of the complaint which alleges that at and prior to the time of said accident, the said John Lancaster was acting within the scope of his employment as a lookout station operator of the United

States Forest Service, an agency of the defendant, but denies all other allegations of Paragraph IX.

6. Defendant admits the allegations contained in Paragraph X of the complaint.

Third Defense

Any injuries sustained or suffered by plaintiff's decedent at the time and place and on the occasion mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the plaintiff, and not by any negligence or fault or want of care on the part of this defendant.

Wherefore, defendant having fully answered plaintiff's complaint herein, prays that plaintiff take nothing by his action and that the complaint be dismissed and held for nought, and that defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,

United States Attorney.

District of Oregon:

/s/ ROBERT R. CARNEY,

Assistant United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the plaintiff by her attorneys, Luvaas, Cobb & Richards, and move the court for an order herein dismissing the above-entitled action without prejudice and without costs to either party and states that it is the intention of the plaintiff that this action be refiled in the State of Arkansas for the convenience of the parties and their witnesses.

Dated this 26th day of March, 1958.

LUVAAS, COBB & RICHARDS,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

Approved:

C. E. LUCKEY,
United States Attorney;

By /s/ ROBERT R. CARNEY,
Assistant United States At-
torney.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

ORDER OF DISMISSAL

Based Upon Plaintiff's Motion to Dismiss, as approved by counsel for the defendant,

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled cause be and the same hereby is dismissed without prejudice and without costs to either party.

Dated this 31st day of March, 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

MOTION

Comes Now the plaintiff, pursuant to an Affidavit attached hereto, and moves the above-entitled court for an order requiring the above-named defendant to show cause in the District Court of the United States, for the District of Oregon, why said court should not set aside its order dismissing the above-entitled cause without prejudice and order that said action for damages be reinstated.

This motion is made in good faith and is founded upon *Hastings Mfg. Co. vs. Federal Trade Commission*, 153 F. 2d 253; *Morse vs. Bragg*, 107 F. 2d 647, and *United States vs. Sixty-five cases of Glove Leather*, 254 Fed. 211.

Dated this 13th day of June, 1958.

LUVAAS, COBB & RICHARDS,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Lane—ss.

I, Ruby Humphreys, being first duly sworn depose and say:

That I am the plaintiff in the above-entitled action and I have a good cause of action for damages as shown by the Complaint on file herein.

That heretofore and on the 31st day of March, 1958, the above-entitled action was dismissed without prejudice and without costs to either party. That this dismissal was taken for the sole purpose of permitting my attorneys, Spitzberg, Bonner, Mitchell & Hays of Little Rock, Arkansas, to refile this action in the District Court of the United States, Eastern District of Arkansas, Western Division, for the convenience of the parties and their witnesses, the death for which damages are sought having occurred within the geographical boundaries of said district.

That my attorneys in Arkansas failed to file this action within the two-year Statute of Limitations applicable to said action. That the death of William Orvie Humphreys occurred May 24, 1956, and the action for damages was not commenced in the District Court of the United States, Eastern District of Arkansas, Western Division, until May 27, 1958.

That I believe the ends of justice will be preserved if I am allowed to reinstate my action for damages in the District Court of the United States for the District of Oregon and then have the action transferred to the District Court of the United States, Eastern District of Arkansas, Western Division, which latter court is a more convenient forum for the trial of the issues of fact in said cause.

/s/ RUBY HUMPHREYS.

Subscribed and Sworn to before me this 13th day of June, 1958.

[Seal] /s/ JOE B. RICHARDS.

Notary Public for Oregon.

My Commission Expires 8-14-59.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9258

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased.

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This matter having come on regularly for hearing on June 30, 1958, pursuant to the Court's order requiring the defendant, United States of America, to show cause why this Court should not set aside its Order of Dismissal, without prejudice, dated March 31, 1958, and allow plaintiff's action to be reinstated, the plaintiff appearing by her attorney Joe B. Richards, and the government appearing by Robert R. Carney, Assistant United States Attorney, and the Court having heard argument of counsel and considered the memorandum of authorities submitted and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's motion for an order setting aside the Order of Dismissal without prejudice, dated March 31, 1958, and reinstating the above-entitled action, be and the same hereby is denied.

Dated this 1st day of August, 1958, at San Diego,
California.

/s/ WILLIAM G. EAST,
United States District Judge.

A True Copy from Photostat Records of Court.

R. DeMOTT,
Clerk.

By /s/ M. SPARGO,
Deputy.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

Civil No. 9258

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from that order dated the 1st day of August, 1958, denying plaintiff's motion for an order setting aside the Order of Dismissal without prejudice dated March 31, 1958, and refusing to reinstate the above-entitled action.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Ruby Humphreys, Administratrix of Estate—William Orvie Humphreys, Deceased, as Principal, and United States Fidelity and Guaranty Company, a corporation, duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at,

as Surety, are held and firmly bound unto United States of America in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00), lawful money of the United States of America, to be paid to the said United States of America, heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 24th day of September, 1958.

Whereas, the aforesaid Principal is filing notice of appeal to the Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the Oregon Division of the Judicial District of in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed

or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY,

By /s/ GORDON PERLICH,
Attorney-in-Fact.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME

Comes Now the plaintiff-appellant, by and through one of her attorneys, Joe B. Richards, and respectfully requests that the above-entitled Court extend the time for filing the record on appeal and docketing appeal for an additional 40 days.

Dated this 31st day of October, 1958.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

It Is So Ordered.

Dated November 3, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 3, 1958.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME

Comes Now the plaintiff-appellant, by and through one of her attorneys, Joe B. Richards, and respectfully requests that the above-entitled Court extend the time for filing the record on appeal and docketing appeal for an additional 10 days.

Dated this 3rd day of December, 1958.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

[Endorsed]: Filed December 3, 1958.

ORDER

So Ordered this 4th day of December, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed December 4, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

1957

July 10—Filed Complaint.

July 10—Issued Summons—to Marshal.

July 12—Filed Summons—with Marshal's return.

1957

Sept. 24—Filed Stipulation for extension of time to answer.

Sept. 24—Filed and Entered Order allowing extension of time for defendant to answer to and including October 1, 1957.

Oct. 4—Filed Answer.

1958

Mar. 31—Filed Motion of plaintiff to dismiss without prejudice.

Mar. 31—Filed and Entered Order dismissing without prejudice.

June 18—Filed Plaintiff's Motion for Order to Show Cause to issue.

June 18—Filed and Entered Order to Show Cause. Set for hearing June 30, 1958, at 11 a.m.

June 30—Record of hearing on order to show cause; under advisement.

Aug. 1—Entered Order denying plaintiff's motion to set aside order of dismissal without prejudice and to reinstate case.

Aug. 4—Filed above order denying plaintiff's motion to set aside order of dismissal, etc.

Sept. 26—Filed Plaintiff's Notice of Appeal.

Sept. 26—Filed Plaintiff's Bond for Costs on Appeal.

Sept. 26—Certified copy of Notice of Appeal mailed C. E. Luckey, U. S. Attorney.

Nov. 3—Filed Plaintiff's motion for extension of time to docket appeal.

1958

- Nov. 3—Filed and entered order extending time an additional 40 days to docket appeal.
- Dec. 3—Filed Plaintiff's motion for extension of time to docket appeal.
- Dec. 4—Filed and entered order (on motion) extending time 10 days after Dec. 15, 1958, to docket appeal.
- Dec. 10—Filed Appellant's Designation of Record on appeal.
- Dec. 17—Filed Appellant's Amended Designation of Record on Appeal.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Motion to Dismiss, Order of Dismissal, Motion to Show Cause, with Affidavit Attached, Certified copy of Order Overruling Motion to Show Cause, Notice of Appeal, Bond for Costs on Appeal, Motion to Extend Time for Docketing Appeal, and Order thereon, Motion to Extend Time for Docketing Appeal Additional Ten Days, and

Order thereon, Amended Designation of Record, and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9258, in which Ruby Humphreys, Administratrix of the Estate of William Orvie Humphries, Deceased, is the plaintiff and appellant, and the United States of America is the defendant and appellee; that the said record on appeal has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1958.

[Seal]

R. DeMOTT,
Clerk.

By /s/ MILDRED SPARGO,
Deputy.

[Endorsed]: No. 16305. United States Court of Appeals for the Ninth Circuit. Ruby Humphreys, Administratrix of the Estate of William Orvie Humphreys, Deceased. Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: December 19, 1958.

Docketed: December 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 16305

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Comes the Appellant and states, pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, that she intends to rely upon the following points in making this appeal:

1. That the Court erred in overruling the Motion to Show Cause.

2. That the Court abused its discretion in refusing to permit the Appellant's cause of action to be reinstated by granting the Motion to Show Cause.

SPITZBERG, BONNER,
MITCHELL & HAYS,

By /s/ STEELE HAYS,

Attorneys for Appellant.

[Endorsed]: Filed January 21, 1959.

No. 16305

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUBY HUMPHREYS, Administratrix of the Estate of
William Orvie Humphreys, Deceased *Appellant*

v.

UNITED STATES OF AMERICA *Appellee*

BRIEF FOR THE APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FILED

APR - 2 1959

LUVAAS, COBB & RICHARDS
and

SPITZBERG, BONNER, MITCHELL & HAYS

Attorneys for Appellant

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United States Court of Appeals

FOR THE NINTH CIRCUIT

RUBY HUMPHREYS, Administratrix of the Estate of
William Orvie Humphreys, Deceased *Appellant*

v.

No. 16305

UNITED STATES OF AMERICA *Appellee*

BRIEF FOR THE APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

STATEMENT DISCLOSING JURISDICTION AND REVIEW

The complaint filed by the appellant in the District Court of the United States, District of Oregon, alleges that appellant's husband, William Orvie Humphreys, was killed by reason of the negligent acts of an employee of the United States while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the appellant in accordance with the law of the place where the act or omission occurred (page 3 of the Transcript of Record).

Title 28, United States Code Annotated, Section 1346 (b), reads as follows:

“Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal

Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred.”

The complaint alleges that the negligent acts occurred in the State of Arkansas (page 4 of the Transcript of Record) and that statutes of Arkansas recognize a cause of action for wrongful death by the heirs or personal representative of a decedent (page 6 of the Transcript of Record).

Arkansas Statutes, Sections 27-906 and 27-907, read as follows:

“Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such a case, the person who, or company, or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been caused under such circumstances as amount in law to a felony. The cause of action herein created shall survive the death of the person wrongfully causing the death of another and may be brought, maintained or revived against the person representatives of the person wrongfully causing the death of another.”

“Every action shall be brought by and in the name of the personal representatives of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act shall be commenced within three years after the death of the person alleged to have been wrongfully killed and not thereafter.”

It is alleged in the complaint that appellant is a bona fide resident of the State of Oregon, wherein the complaint was filed (page 3 of the Transcript of Record). The District Court wherein claimant resides has jurisdiction over the alleged cause of action. *Olsen v. United States* (CCA 8th S.D. 1949), 175 F. 2nd 510. *Knecht v. United States* (CCA E.D. Pa. 1957), 242 F. 2nd 929.

On March 31, 1958, appellant moved to dismiss her complaint without prejudice in order to refile in the State of Arkansas, for convenience of the parties (page 10 of the Transcript of Record). On March 21, 1958, the court granted same by appropriate order (page 10 of the Transcript of Record). On June 13, 1958, appellant filed a motion to show cause why said order should not be set aside (page 11 of the Transcript of Record) and on August 1, 1958, the lower court dismissed the motion (page 14 of the Transcript of Record).

The United States Court of Appeals, Ninth Circuit, has jurisdiction to review the order of the District Court of the United States, District of Oregon, as to the question of an abuse of discretion. *Corpus Juris Secundum* Volume 5A, Appeal & Error, Section 1631, page 174. *Pugh v. Bluff City Exersion Co.* (CCA 6th W.D. Tenn. 1910), 177 F. 399. *Vallery v. Glenwood Irrigation Co.* (CCA 8th Colo. 1918), 248 F. 483. *Cohen v. Young* (CCA 6th E.D. Mich. 1942), 127 F. 2nd 721. *Home Owners Loan Corporation v. Huffman* (CCA 8th W.D. of Mo. 1943), 134 F. 2nd 314.

STATEMENT OF THE CASE

On May 24, 1956, William Humphreys was killed in a well situated on property belonging to the United States Government, Forestry Division of the Department of Agriculture. Death was attributed to poisonous gases in the well. William Humphreys had gone into the well in an unsuccessful attempt to save his brother, Richard from death from the same cause.

Surviving William Humphreys are the appellant, Ruby Humphreys, and six minor children, ranging in ages from thirteen years to three years.

In July of 1957 the present suit was filed by Ruby Humphreys in the United States District Court for the District of Oregon against the United States of America under the Federal Tort Claims Act (Section 1346, Title 28, USCA), alleging that the death of William Humphreys was caused by the negligence of an employee of the United States under such circumstances as to render the United States liable in tort, if it were a private person.

The complaint alleged specifically that the brother of William Humphreys had gone into the well pursuant to an agreement with one John Lancaster, employee of the defendant, to clean out the well and while therein he became ill and called out for help; that William Humphreys entered the well pursuant to the call for assistance, and as a consequence he died from inhaling the poisonous gases. It was alleged that John Lancaster failed to advise either Richard Humphreys or William Humphreys that there had been a known leakage of poisonous gas in the well on previous occasions; failed to provide a safe method of egress to and from the well and in failing to station other persons at the top of the well in the

event of an emergency. Damages in the amount of \$84,000.00 were prayed by the appellant on behalf of herself and the minor children.

In response to the complaint, the United States filed an Answer stating, as its first defense, that venue for the action did not lie in the United States District Court for the District of Oregon but venue lay, if the suit were maintainable at all, in the United States District Court, for the Eastern District of Arkansas, for the reason that the appellant was a resident of Arkansas at the time of the death of William Humphreys. As its other defenses the defendant asserted, in effect, that John Lancaster had not acted negligently and that William Humphreys death was caused in whole or in part by his own negligence.

Subsequently, appellant's counsel moved on March 31, 1958, to dismiss the complaint upon the intention of the appellant to refile the action in the State of Arkansas for the convenience of the parties and their witnesses.

This motion was duly granted by an order of dismissal without prejudice entered on the same date as the filing of the motion.

Thereafter on June 13, 1958, counsel for appellant filed a motion to show cause why the order of dismissal without prejudice should not be set aside and the action reinstated. Accompanying the motion was the appellant's affidavit that the contemplated suit in the United States District Court for the Eastern District of Arkansas had not been filed until May 27, 1958, and as death had occurred on May 24, 1956, more than two years prior thereto, limitations had run against the appellant's cause of action and that justice would be preserved if appellant were permitted to reinstate her cause in the United States District Court, District of Oregon.

By order dated August 1, 1958, the Court entered an order denying the motion to reinstate the cause without explanation. The appellant brings this appeal.

POINTS RELIED UPON

The question presented by this appeal is simply one of whether it can be said that the refusal of the Court below to set aside its order of dismissal without prejudice and thereby reinstate the cause of action was an abuse of discretion.

ARGUMENT

Counsel for appellant concede at the outset that securing a reversal on the grounds of abuse of discretion would always appear to be a most difficult task. Only a sincere conviction that a careful scrutiny of this appeal will lead this Honorable Court to a recognition of a clear injustice gives us the temerity to undertake this appeal.

Stated in the simplest terms possible, the lower court had before it the question of whether the appellant's cause of action against the appellee was to be barred by limitations, or whether the Court, by the simple expediency of granting an order which it had full authority to do, should give life to a cause that was otherwise without it.

Let us briefly review the situation so as to make clear the appellant's predicament when the court below was called on to grant relief to the appellant in the form of reinstatement of the complaint.

The appellant filed suit on July 10, 1957, on an alleged cause of action against the government for the wrongful death of her husband some thirteen months previous (on May 24, 1956) under the Federal Tort Claims Act, being Title 28, United States Code, Section 1346. The filing of suit was within fourteen months of the date the cause of action arose (being the date of death) and was, therefore, well within the two-year period of limitations provided in the act, at Section 2401 (b), Title 28. The government, acting through the United States Attorney, District of Oregon, answered on October 4, 1957 (nearly four months from the filing of the complaint), and asserted, among other defenses, that the only venue for appellant's cause of action, if indeed she had one, was

in the federal court in Arkansas, where the cause of action arose.

Thereafter appellant on March 31, 1958, voluntarily moved to dismiss her complaint upon the express intention of refiling the suit in the State of Arkansas "for the convenience of the parties and their witnesses", and, incidentally, it would seem that appellant could have had no other purpose than the stated "convenience" of the parties, most particularly the defendant, inasmuch as the Act has been interpreted to allow suit at any place of residency of the plaintiff, regardless of where the occurrence took place. *Olsen v. United States* (CCA 8th S.D. 1949), 175 F. 2nd 510.

The court thereupon granted appellant's motion, on March 31, 1958, and as appellant's affidavit makes clear the contemplated suit in Arkansas was not filed within the two years provided for in Title 28, Section 2401 (b), U.S.C.A. Confronted with this fire situation, appellant promptly (on June 13, 1958) moved the court to permit the appellant's reinstatement of her cause by setting aside the earlier order of dismissal without prejudice. At this point, let it be stated, parenthetically, that counsel for appellant assumes full responsibility for this development, no part of which is attributable to appellant.

On August 1, 1958, the Court denied the appellant's motion and thereby the appellant was left without a means of presenting her cause upon its merits. This statement is made on the basis of the decision in *Jones v. United States* (D.C. D. C. 1954), 126 Federal Supplement 10, affirmed in 207 F. 2nd 563. This case presents a procedural problem identical to the case at bar. Suit was filed against the United States on an alleged cause of negligent misrepresentation in the Southern District of New York. Subsequently the cause was dismissed with-

out prejudice and filed in the District Court of the District of Columbia but not within the time provided in the Federal Tort Claims Act. It was held that the period of limitation provided in the Act (Section 2401 (b)) was not tolled by the pendency of the suit in the District Court for the Southern District of New York.

As we know of no rule of law which would make it mandatory upon the Court to grant a reinstatement of the cause, it must be regarded as a question which addressed itself to the sound discretion of the court and, traditionally, not subject to reversal except by reason of an abuse of such discretion.

What, then, constitutes an abuse of discretion?

There are many definitions for the term "abuse of discretion" and while the language used is varied, the definitions are, in effect, identical to a great extent, with some refinements here and there.

Abuse of discretion has been defined as action which is "arbitrary", *Hartford-Empire Co. v. Obear-Hester Glass Co.* (CCA 8th E.D. Mo. 1938), 95 F. 2nd 414; or "capricious", *Texas Indemnity Insurance Co. v. Arant*, 171 S.W. 2nd 915; or "improvident", *Quinn v. Gardner* (CCA 8th S.D. 1929), 32 F. 2nd 772; "a plain error of judgment", *State v. Griffin* (So. Carolina), 84 S.E. 876; "manifestly unreasonable", *Michaels v. Moritz*, 131 Pa. Super. 426, 200 A. 176; or "a clearly erroneous conclusion and judgment, one contrary to the logic and effect of such facts as are presented", *Starr v. State* (Okla.), 115 P. 356; or action that "effects an injustice", *Hale v. Hale*, 25 P. 2nd 246, 6 Cal. App. 2nd 661; "or a failure to exercise a sound, reasonable, and legal discretion", *Adair v. Pennewill*, 4 W. W. Harr. 390, (Deleware) 153 A. 859; "judicial discretion means nothing else but exercising the best of

the court's judgment on the occasion that calls it forth", *Bringhurst v. Harkins*, 2 W. W. Harr. 324, 122 A. 783.

American Jurisprudence, citing *Burns v. United States*, 287 U.S. 216, 77 L. Ed. 266, Volume 3, Appeal and Error, Sec. 959, states the general rule on discretionary matters as follows:

"The rule is universal that the action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof; or, as it is frequently stated, the appellate court will not review the discretion of the trial court. This rule, or rather this statement of the rule does not give the trial judge an entirely free hand in what might be termed discretionary matters. The exercise of judicial discretion which may not be reviewed implies conscientious judgment, not arbitrary action, takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge toward a just result."

Perhaps the most realistic and practical effort has been suggested by decisions like *Usher v. Scranton Railway Co.* (CCA Pa. 1904), 192 Federal 405, wherein it was said that the matter of discretion is subject to no fixed rule "except a consideration of what is just", and *Thompson v. Stonom* (Ohio, 1943), 57 N.E. 2nd 788, wherein it was said that "the exercise of discretion does not necessarily follow strict rules of law, but may be exercised in what the court conceives to be demanded in justice", or *Delno v. Market Street Ry. Co.* (CCA 9th N.D. Cal. 1942), 124 F. 2nd 965, wherein the court defined discretion as:

"The power exercised by the courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the Court."

In the case of *Hartford Empire Company v. Obear-Heester Glass Co.* (CCA 8th E.D. Mo. 1938), 95 F. 2nd 414, the Court stated, referring to questions of abuse of discretion, that "every investigation of this sort is governed by the situation and circumstances of particular case".

It would seem then that the court, in exercising discretion is held to a standard of reasonable, conscientious judgment toward the end that justice can be served. Moreover, it seems to us that if any one element should be paramount and entitled to greater consideration than other elements to be weighed in a consideration of the discretion of the lower court, it would have to be the question of justice. Is justice better served by the manner in which the court's discretion was exercised? Or is it not?

Clearly, in the present case, the effect of the court's ruling works an obvious and unmistakable injustice upon the appellant. The court had the power and the means to permit the appellant's cause of action to be re-instated. Without the exercise of that power the appellant is entirely without a means of presenting her cause upon the merits. What else can be said but that the effect of the ruling of the Court presents an injustice? The court holds the sole power by which the appellant may proceed, without it, *no means exists* by which she may have her cause litigated. Nor is this a case in which the granting by the court of that which the appellant is asking involved, coincidentally, a proportionate detriment to the appellee. Can the appellee contend that the Government of the United States is in any wise prejudiced by the order which the court refused to grant? Emphatically not, unless the reinstatement of the appellant's cause, which had been alive just a few short weeks before, is a prejudice to the Government. Indeed, we hope that the Government's position is not so precarious that it should strive to cling

to such advantage as was coincidentally worked by reason of the misadventure to which appellant befell. It seems that a zealous argument against the reinstatement of this cause by the appellee is not in harmony with the same spirit that moved the Congress to enact the Federal Tort Claims Act. How can the Government of the United States be heard to say that the granting of a reinstatement of the appellant's cause is prejudicial to the government? Has its position somehow been changed? Clearly not.

It is granted, of course, that the appellant's present misfortune occurred through no fault of the court, or of the appellee (or for that matter of the appellant) and the court can, with prefect accuracy, decline any responsibility for the result; nevertheless, it is still a simple fact that the court held the key to the one door which could be opened to the appellant and enable her cause to be considered on its merits and this was achievable *without burdening the court or prejudicing the appellee*. Therefore, what possible objection could the court have had for declining to do that which the appellant asked? Is it any less the duty of a Court to work for a just and fair conclusion in the present situation? It seems to us that the duty of the Courts to do justice must overshadow all other considerations and where a means exists whereby justice may done to one party which is not unjust to the other party, a refusal by the court, without explanation, to effect such a means, is arbitrary.

Black's Law Dictionary, page 134, defines arbitrary as "not supported by fair, solid and substantial cause, and without reason given".

Appellant submits that regardless of which definition of abuse of discretion this Court may prefer, we can find no basis for justifying the ruling below. In the final

analysis it is clear that the decision works an injustice *without just cause*, and no matter what language is used it should be readily apparent that discretion was abused.

May we hasten to add that we are in a somewhat difficult situation in urging an earnest conviction that discretion has been abused without leaving the inference that a reflection has been cast upon the lower court. Such is certainly not intended. And indeed, decisions of various courts recognize that the term "abuse of discretion" is an unfortunate one in that it carries a connotation of judicial impropriety which is not contemplated or intended. In *Macauley v. Query*, 193 S.C. 1, 7 S.E. 2nd 519, it was said that abuse of discretion does not mean any reflection upon the presiding judge. In *Brown v. Beck*, 64 Ariz. 299, 169 P. 2nd 855, the Supreme Court of Arizona stated:

"Abuse of discretion does not mean any reflection upon the presiding judge and does not carry with it an implication of conduct deserving of censure, but is strictly a legal term indicating that the appellate court is of the opinion that under the circumstances the trial court committed error of law in exercise of its discretion."

In *Eager v. Derowitsch*, 68 Wyo. 251, 232 P. 2nd 713, the Wyoming Court used similar words. And the United States Court of Appeals, Third Circuit, reached a similar view in *Beck v. Wings Field, Inc.* (CCA 3rd E.D. Pa. 1941), 122 F. 2nd 114:

"The term abuse, however, when applied to a court's exercise of discretion is peculiarly of legal significance, wholly unrelated to the meaning of the same term when used in common parlance. Action that would be necessary in ordinary affairs to make one guilty of an abuse connotes conduct of a different grade than what is meant when a court is said to have abused its discretion. Abuse of discretion in law means that the court's action was in

error as a matter of law. And where such abuse exists, reversal will be ordered.”

In the case of *Weeks v. Bareco Oil Co.* (CCA 7th N.D. Ill. 1941), 125 F. 2nd 84, the court went a step further and held, wisely we believe, that in cases (as in the present case) where the facts were not disputed, the upper court could exercise its own judgment rather than simply pass on the judgment of the lower court:

“But what is abuse? Determination of abuse involves the exercise, by us, of sound judgment upon the facts. If there is controversy upon the facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and should not be. Then their, the appellate court’s, review does not include the trial court’s discretion.

“If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge (by affidavits) we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment.”

See also *In re Roth* (CCA 7th, 1942), 125 F. 2nd 396.

Several cases have held that an abuse of discretion results where the court fails or refuses to exercise its discretion. *Munroe v. Birdsey* (Florida), 136 So. 886. *Shurin v. United States* (CCA 4th, N. C.), 164 F. 2nd 566. *State v. Damon* (Mo), 169 S.W. 2nd 382.

From the foregoing citations five points would seem to be established:

1. The discretion to be exercised by trial court is broad, but not unlimited and is subject to review on appeal as to its justice, logic, reason and soundness.

2. Every case is to be considered on its own facts and circumstances.

3. A determination by an appellate court that the trial court has abused its discretion carries with it no connotation that the integrity or ability of the court is questioned.

4. Where the discretion of the trial Court called for a determination *not* involving a dispute of a fact question, then the upper court is as well able to decide the issue as the lower court.

5. An abuse of discretion occurs when the court refuses or declines to exercise its discretion.

We move from these general principles of abuse of discretion to the application of these principles to the specific problem, and it becomes at once apparent that as perhaps in no other field of the law, there is less likelihood of finding a precedent for the identical situation at hand. Indeed, the very nature of discretionary rulings is based upon a recognition that exact duplicate situations are unlikely to arise again, in precisely identical fashion.

We have found no case with an identical situation to the case at bar and we would be surprised if one existed. The following citations present either some basis for comparison to the situation presented by this appeal or involve circumstances containing some similarities, we hope not too distant, to be of assistance to this Court.

In the case of *In re Keith Macauley Ross* (California, 1937), 67 P. 2nd 94, 110 A.L.R. 217, the court held that the lower court abused its discretion in refusing to permit

appellant to change his name, although the statute clearly gave the court the discretionary power to grant or decline petitions for change of name. The change was apparently denied on the ground that Ross had taken bankruptcy and a change in name would work a fraud on those with whom he might deal on credit. Upper court stated:

“We do not mean to suggest that the lower court must in every case grant a petition in proper form for change of name, but it is our view that some *substantial reason must exist* for the denial, and that none appears in the record before us. The judgment is reversed with directions to the trial court to grant the petition” (emphasis supplied).

In *Thompson v. Stonom* (Ohio, 1943), 57 N.E. 2d 788, the Supreme Court of Ohio upheld the setting aside by the trial court of a jury verdict holding against a will which had been unopposed, although notice had been given in proper form to all interested parties, stating:

“The exercise of discretion does not necessarily follow strict rules of law, but may be exercised in what the Court conceives to be demanded in justice”.

Moreover, it may be said of the existing decisions dealing with discretion that the courts have been more concerned with effecting justice than in holding parties litigant to strict application of rules where unusual circumstances exist, and this is true even where the outcome can be said, at least in part if not entirely, to be attributable to mistake or neglect of a party or his counsel.

In *Automatic Oil Heating Company v. Lee* (Illinois, 1938), 16 N.E. 2d 919, a judgment by confessions was entered against the defendant. Twenty days after entry of the judgment the defendant moved to “open up” the judgment. The reason for the entry of the judgment and the grounds for setting aside are not clear from the opin-

ion. Subsequently, an order was entered overruling defendant's motion. On appeal, the lower court was reversed on abuse of discretion and the court looked, not to the entry of the judgment so much as that a meritorious defense existed:

“The general rule is that on motion to open a judgment entered by confession and for leave to defend the question of a meritorious defense is of much more importance than the question of the defendant's diligence, or lack of it.”

In *Borst v. Young* (Massachusetts, 1939), 18 N.E. 2nd 544, the complaint was dismissed by the clerk after three years of inactivity; under rules of the court dismissal by the clerk was the equivalent of a final determination. The statement of fact states that “through the same negligence” nothing was done towards vacating the final decree till after death of first attorney. Later another attorney was employed and after still more months of delay a motion to vacate was filed and granted, approximately one year after entry of original dismissal. Lower court set aside the dismissal and defendant appealed on grounds of abuse of discretion. Affirmed.

In *Williams v. Pacific Surety Co.* (Oregon, 1914), 139 p. 934, the defendant demurred to the complaint; demurrer overruled and defendant elected to stand on his pleading and declined to file an answer. Court below entered judgment and later refused to grant defendant's motion to “open up” the judgment and permit the filing of an answer. The order below was silent as to its reasons for declining to open up the judgment. It appears from the opinion that the earlier judgment was affirmed on appeal. Also, it appeared that the defendant had relied on a rule of Oregon procedure in refusing to plead further which was somehow overlooked in the earlier opin-

ion. The upper Court held that an abuse of discretion had occurred in failing to open up the judgment, saying:

“While the court below was invested with discretion in this matter, that discretion was a legal discretion to be exercised according to the principles of the law, and in a manner to do substantial justice. This discretion vested in the trial court is a legal and not an arbitrary or personal discretion, *and it must be so exercised as to do substantial justice under the circumstances of each particular case* (emphasis supplied).

“To refuse to permit the appellant to answer, under the circumstances of this case, was in effect a denial of justice.”

In *Boaz v. Martin* (Oklahoma, 1924), 225 p. 516, court below refused to vacate a judgment entered “in the absence of the plaintiff” at a regular day of the court (although it was Christmas Eve). The upper court stated expressly that the judgment was undoubtedly valid but refused to permit it to stand, holding that the court abused its discretion in not setting it aside, although apparently entered in proper fashion and in keeping with rules of lower court. It was noted in the opinion that counsel for plaintiff assumed that the court was not going to act again on pending cases before the following term, *but there is nothing in the opinion to indicate that counsel had a right to make such assumption.*

Finally, in *Levee District No. 4 v. Small* (Missouri, 1955), 281 S.W. 2nd 614, a judgment of dismissal for failure to prosecute was entered on May 24, 1954, which the trial court refused to vacate on timely motion filed by plaintiff. It appeared that plaintiff had mistakenly assumed that a stipulation between parties working toward settlement had been filed in the cause. Also, the defendant had joined in plaintiff’s motion to vacate. The

upper Court held that the lower court had abused its discretion and used language which must surely strike a responsive note with every practicing lawyer:

“In judicial efforts to achieve the primary purpose and attain the broad objective of all litigation, which is, simply and succinctly stated, to do justice, no principle has found more universal acceptance than that each case must rest and be ruled upon its own particular facts. This is equally true in considering whether a case should have been dismissed for want of prosecution and in determining whether a default judgment should have been set aside (citations omitted). . . . These cases, involving the wisdom of trial judges in the exercise of the discretion vested in them by law, are in the nature of things to be considered one at a time, and not as an integral branch of our system of jurisprudence, where we can evolve certain rules of conduct that will fit any certain number of character of cases.”

“It is plain that the trial court committed no error in dismissing the instant case, but whether on the showing subsequently made, the judgment of dismissal should have been set aside is an entirely different question. Although courts are, no doubt, frequently vexed by the seeming indifference, inattention and carelessness of counsel, it is well for judges to keep in mind that they too were once practicing attorneys, and we are not inclined to be less ready and willing than defendants’ counsel to recognize that the practical problems encountered by a busy lawyer are manifold and varied, impose heavy demands upon his time, mind and memory, and keep him under constant and unrelenting pressure, stress and strain. We would not be misunderstood as entertaining any views ‘which will permit a party to trifle with the rules of practice of the court’ or as discouraging dismissal of *inactive* cases for want of prosecution unless good cause for further continuance be shown. But, desirable as it is that courts should keep their dockets current, it

is of greater importance that their work should be done with care and that they should be ever diligent and zealous in their unremitting efforts to attain the ends of justice'' (citation omitted).

We earnestly urge the court to grant to the appellant a trial upon the merits of her cause, and nothing more, by a reversal of this case upon grounds of abuse of discretion, and the only cause that will be served by so doing will be that justice prevailed.

Respectfully submitted,

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Attorneys for Appellant

United States
COURT OF APPEALS
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the Estate
of William Orvie Humphreys, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the United States District Court
For the District of Oregon.*

C. E. LUCKEY,
United States Attorney,
District of Oregon,

ROBERT R. CARNEY,
Assistant U. S. Attorney,
Attorneys for Appellee.

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NO. 16305

United States
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for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the Estate
of William Orvie Humphreys, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the United States District Court
For the District of Oregon.*

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Jurisdiction of the District Court is conferred by 28 USC § 1346(b) (Federal Tort Claims Act). Jurisdiction of this court to review the judgment of the District Court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 73, Federal Rules of Civil Procedure.

QUESTION PRESENTED

Whether the trial court properly denied appellant's motion to set aside a previous order of dismissal without prejudice, which would have resulted in the reinstatement of this action subsequent to the expiration of the statute of limitations.

STATUTES AND RULES INVOLVED

28 USC § 2401(b).

Rules 41(a)(2) and 60(b), Federal Rules of Civil Procedure.

—set forth in Appendix.

STATEMENT OF THE CASE

On July 10, 1957, the appellant filed this action in the District of Oregon against the United States of America under the Federal Tort Claims Act for damages for the death of her husband on May 24, 1956 in the Eastern District of Arkansas due to the alleged negligence of an employee of the United States.

In its answer the government asserted as one of its defenses that the venue of this action did not lie in the District of Oregon because the appellant was a resident of the Eastern District of Arkansas at the time the accident occurred in that district.

On March 31, 1958, appellant filed a motion to dismiss the action without prejudice, stating in the motion

that it was the intention of the appellant to refile the action in the State of Arkansas. On the same date the court entered an order that the action "is dismissed without prejudice".

At the time the action was dismissed in the District of Oregon without prejudice, the two-year statute of limitations under the Federal Tort Claims Act (28 USC § 2401(b)) had not yet expired and the action would not be barred until the expiration of another 54 days. The appellant, however, did not file her action in the Eastern District of Arkansas within the two-year period, which expired on May 24, 1958.

On June 18, 1958, appellant filed a motion in the District of Oregon for an order setting aside the order previously entered dismissing the action without prejudice and requesting that the action be reinstated. This motion was denied by the Court on August 4, 1958, following oral argument and the presentation of briefs. This appeal followed.

ARGUMENT

I. Court Properly Denied Appellant's Motion to Reopen this Action Which had been Barred by the Statute of Limitations.

This action was voluntarily dismissed without prejudice on appellant's motion by an order of the court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. A voluntary dismissal without prejudice leaves the situation as though no action had been commenced. The statute of limitations is not tolled or sus-

pendent during the time this action was pending before being dismissed without prejudice. *Willard v. Wood*, 1896, 164 U.S. 502, 523; *Maryland Casualty Co. v. Latham*, 5 Cir. 1930, 41 F.2d 312; *Bunger v. U.S. Blind Stitch Mach. Corp.*, S.D. N.Y. 1948, 8 FRD 362; 54 CJS, Limitation of Actions, § 287(a).

The effect upon the statute of limitations of a dismissal without prejudice has been briefly stated in 34 Am. Jur., Limitation of Actions, § 281:

"In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him, and if, before he commences a new action after having become non-suited or having had his action abated or dismissed, the limitation runs, the right to a new action is barred."

The same principle was applied by the Supreme Court of the United States in *Willard v. Wood*, supra, at 523:

"The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. *Alexander v. Pendleton*, 8 Cranch, 462, 470; *Young v. Mackall*, 4 Maryland, 367; *Wood on Limitations*, §293, and cases cited."

Similarly in *Bunger v. U. S. Blind Stitch Mach. Corp.*, supra, an earlier action had been commenced in the Eastern District of New York and voluntarily dis-

missed. A second action was commenced in the Southern District of New York and the Court held that the earlier action had not tolled the statute of limitations because the voluntary dismissal of the earlier action left the situation just as if the earlier action had never been filed.

The government's consent to the voluntary dismissal in the District of Oregon does not toll or suspend the statute of limitations. In *Sorensen v. Overland Corp.*, D.C. Del. 1956, 142 F. Supp 354, aff. 3 Cir. 1957, 242 F.2d 70, plaintiff commenced an action against the corporation for compensation and indemnification as an officer of the corporation in state court in Michigan, which action was removed to federal court in Michigan, where it was dismissed without prejudice on stipulation of the parties. Subsequent to the expiration of the statute of limitations, a new action was filed in federal court in Delaware. Plaintiff claimed that by reason of the stipulation for dismissal of the Michigan action without prejudice, the Delaware action became a continuation of the Michigan action and the defendant could not urge the statute of limitations. The court held that this contention was without merit and "finds no precedent either in authority or reason."

The two-year period of limitations prescribed by the Federal Tort Claims Act (28 USC § 2401(b)) was not extended by the pendency and dismissal without prejudice of this action. *Jones v. U. S.*, D.C. 1954, 126 F. Supp 10, aff. D.C. Cir. 1955, 228 F.2d 52.

In the *Jones* case, a prior action had been com-

menced in the Southern District of New York and subsequently dismissed following an appeal. The government moved to dismiss a second action brought in the District of Columbia on the ground that it was barred by the statute of limitations. The plaintiff contended that the running of the statute of limitations was suspended during the pendency of the action in the Southern District of New York by virtue of the New York statute which tolls the statute of limitations during the pendency of an action dismissed other than on the merits. The Court held that the period of limitations prescribed by the Federal Tort Claims Act is applicable, rather than the New York statute, and therefore the action was barred by the statute of limitations.

In *Di Sabatino v. Mertz*, M.D. Penn. 1949, 82 F. Supp 248, an action for damages was instituted in the Middle District of Pennsylvania after the one-year period of limitation had expired. An earlier action had been commenced in the Eastern District of Pennsylvania but was dismissed for lack of venue. The Court held that when an action is dismissed, other than on its merits, before the statute of limitations has expired, a new action for the same cause may be instituted within the statutory period, but that in the absence of a special tolling statute, no new action may be commenced after the period of limitation.

This Court has also held that a final order dismissing an action without prejudice for lack of jurisdiction will not toll the statute of limitations and that any subsequent action on the same cause must be commenced

within the period of limitations. *Fern v. U. S.*, 9 Cir. 1954, 213 F.2d 674. In the *Fern* case, the District Court dismissed the first amended complaint for lack of jurisdiction, as it alleged damages in contract against the government in excess of the jurisdictional amount provided by the Tucker Act. A second amended complaint was dismissed as it was not filed within the period of limitations. The filing of the second amended complaint did not serve to reanimate or revitalize the original action which had been finally dismissed for lack of jurisdiction.

In the present case, the court's order, based on appellant's motion, dismissing this action without prejudice, was a final order and leaves the situation as if the action had not been commenced. Any attempt to reopen the case would have to occur prior to the expiration of the two-year statute of limitations prescribed by the Federal Tort Claims Act.

II. The Time within Which an Action Must Be Commenced under the Federal Tort Claims Act Is Jurisdictional.

The time requirement prescribed by the Federal Tort Claims Act granting the right to sue the United States of America is a condition or qualification of the right and is therefore jurisdictional rather than a mere statute of limitations. *Simon v. U. S.*, 5 Cir. 1957, 244 F.2d 703; *Sikes v. U. S.*, E.D. Penn. 1948, 8 FRD 34.

It follows that the bringing of an action under the Federal Tort Claims Act within the specific time set forth in the Act is a condition precedent to the exist-

ence of the cause of action itself. The trial court was therefore without jurisdiction to reinstate this action in order that it might be commenced after the expiration of the period.

It is equally clear that where a statute creates a right of action, the limitation prescribed therein within which the action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action. 34 Am. Jur., Limitation of Actions, § 281, 120 ALR 376, at 379; *U. S. to use of Gibson Lumber Co. v. Boomer*, 8 Cir. 1910, 183 F. 726, 730.

III. There Is No Basis under Rule 60(b), Federal Rules of Civil Procedure, for Setting Aside the Order of Dismissal.

The order of dismissal without prejudice was entered by the court on the motion of appellant, at which time appellant intended to refile this action in the Eastern District of Arkansas. The final order of dismissal in the District of Oregon was, therefore, not entered by reason of mistake, inadvertence, surprise, or excusable neglect on the part of the appellant, the government, or the court. On the contrary, the order was apparently entered on the motion of the appellant in order to avoid any venue question in the District of Oregon and so that the case could be refiled in the Eastern District of Arkansas for the convenience of the witnesses.

There is no contention by appellant that there is any other ground under Rule 60(b) by which the District

Court might have granted an order setting aside the order of dismissal. In particular, no claim has been made that the order of dismissal was entered as the result of fraud, misrepresentation or other misconduct on the part of the government.

The act or omission justifying the setting aside of an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure must have existed at the time of the entry of the order. The rule will not be applied where the only act or omission urged as an instance of excusable neglect was a mistake, inadvertence or failure of the party occurring subsequent to the entry of the order. In *Edwards v. Velvac, Inc.*, E.D. Wisc. 1956, 19 FRD 504, the court held that Rule 60(b) was inapplicable where the only reason urged for setting aside an order was the plaintiff's failure to subsequently file his notice of appeal within the required time. The rule may only be applied when a showing is made that the final order sought to be set aside was entered because of mistake, inadvertence, surprise or excusable neglect occurring at the time of the entry of the order (p. 507):

"The plaintiff does not and cannot point to any instance of mistake, inadvertence, surprise or excusable neglect, the happening of which resulted in the entry of the judgment from which he asks relief."

Rule 60(b), therefore, should not be used as a means of circumventing other rules or statutes. In the *Edwards* case, the court did not allow the rule to be used to set aside a final judgment in order that the time for appeal might begin anew merely because appellant failed to file

his notice of appeal timely. In the present case, the trial court refused to apply the rule to set aside a final order dismissing the action merely because the appellant subsequently failed to refile the action within the period of limitation.

Appellant's subsequent failure to refile the action within the period of limitation did not create any ground for the application of Rule 60(b). The trial court did not abuse its discretion in denying appellant's motion, as appellant's situation did not present any basis for the exercise of discretion.

CONCLUSION

The court properly denied appellant's motion to reopen this action. The voluntary dismissal without prejudice left the situation as though no action had been filed. The period of limitation continued to run uninterrupted by the pendency and dismissal of the action in the District of Oregon and expired prior to appellant's attempt to reopen the case. The period of limitation incorporated in the Federal Tort Claims Act is jurisdictional and cannot be extended by the pendency and dismissal of the former action.

There was not any abuse of discretion by the trial court in denying appellant's motion to set aside the final order of dismissal. In fact, appellant's situation did not present any basis for the exercise of discretion. The entry of the order of dismissal was not the result of any mistake, inadvertence or excusable neglect. Appellant's

subsequent failure to refile the action is not a proper ground for relief under Rule 60(b), Federal Rules of Civil Procedure.

It is respectfully submitted that the trial court properly denied appellant's motion to set aside the order of dismissal without prejudice, which would have resulted in the reinstatement of this action subsequent to the expiration of the period of limitation prescribed by the Federal Tort Claims Act.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney,
District of Oregon,

ROBERT R. CARNEY,
Assistant U. S. Attorney,
Attorneys for Appellee.

May, 1959.

APPENDIX

28 USC §2401(b)

“A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . . .”

RULE 41, FEDERAL RULES OF CIVIL PROCEDURE
“DISMISSAL OF ACTIONS

“(a) *Voluntary Dismissal: Effect Thereof—*

* * *

“(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.”

RULE 60, FEDERAL RULES OF CIVIL PROCEDURE

“(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, re-

leased, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." * * *

**In the United States Court of Appeals
for the Ninth Circuit**

ROBERT WOODROW TROWBRIDGE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF AND APPENDIX FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

**LEE A. JACKSON,
A. F. PRESCOTT,
ARTHUR I. GOULD,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

FILED

APR 16 1959

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16306

ROBERT WOODROW TROWBRIDGE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF AND APPENDIX FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (Appendix, *infra*) is reported at 30 T. C. 879.

JURISDICTION

The petition for review involves federal income taxes for the taxable year 1954. The Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$377. Within ninety days and on October 8, 1956, the taxpayer filed a petition with the Tax Court for a determination of that deficiency under the provisions of Section 6213

of the Internal Revenue Code of 1954. The decision of the Tax Court was entered on July 9, 1958. The case is brought to this Court by a petition for review filed October 7, 1958. Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954. (Docket Entries, Tax Court Opinion and Decision, Appendix, *infra*.)¹

QUESTION PRESENTED

Whether the Tax Court correctly held that the taxpayer was not entitled to exemptions under Section 152(a)(9) of the 1954 Internal Revenue Code for persons who did not commence to maintain their principal place of abode in the home of the taxpayer and become members of his household until March of the taxable year under review.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 151. ALLOWANCE OF DEDUCTIONS FOR PERSONAL EXEMPTION.

(a) *Allowance of Deductions*.—In the case of an individual the exemptions provided by this section shall be allowed as deductions in computing taxable income.

* * * *

(e) *Additional Exemption for Dependents*.—

¹ The Commissioner has not received a copy of the record in the instant case; consequently, as a convenience to the Court, we have printed as an appendix to our brief the most pertinent matters that we deem appropriate to be considered for review.

(1) *In general*.—An exemption of \$600 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than \$600, or

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 151.)

SEC. 152. DEPENDENT DEFINED.

(a) *General Definition*.—For purposes of this subtitle, the term “dependent” means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

(2) A stepson or stepdaughter of the taxpayer,

(3) A brother, sister, stepbrother, or stepsister of the taxpayer,

(4) The father or mother of the taxpayer, or an ancestor of either,

(5) A stepfather or stepmother of the taxpayer,

(6) A son or daughter of a brother or sister of the taxpayer,

(7) A brother or sister of the father or mother of the taxpayer,

(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer,

(9) [as amended by Sec. 4(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, or

(10) An individual who—

(A) is a descendant of a brother or sister of the father or mother of the taxpayer,

(B) for the taxable year of the taxpayer receives institutional care required by reason of a physical or mental disability, and

(C) before receiving such institutional care, was a member of the same household as the taxpayer.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 152.)

SEC. 7805. RULES AND REGULATIONS.

* * * *

(b) *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or ~~regulation~~ ^{regulation}, relating to the internal revenue laws, shall be applied without retroactive effect.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7805.)

Treasury Regulations on Personal Exemptions (1954 Code) :

Sec. 1.152-1. *General definition of a dependent.*—

* * * *

(b) Section 152(a)(9) applies to any individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who lives with the taxpayer and is a member of the taxpayer's household during the entire taxable year of the taxpayer. An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law. It is not necessary under section 152(a)(9) that the dependent be related to the taxpayer. For example, foster children and children awaiting adoption may qualify as dependents. It is necessary, however, that the taxpayer both maintain and occupy the household. The taxpayer and dependent will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, or vacation shall be considered temporary absence due to special circumstances. The fact that the dependent dies during the year shall not deprive the taxpayer of the deduction if the dependent lived in the household for the entire part of the year preceding his death. Likewise, the period during the taxable year preceding the birth of an individual shall not prevent such individual from qualifying as a de-

pendent under section 152(a)(9). Moreover, a child who actually becomes a member of the taxpayer's household during the taxable year shall not be prevented from being considered a member of such household for the entire taxable year, if the child is required to remain in a hospital for a period following its birth, and if such child would otherwise have been a member of the taxpayer's household during such period.

* * * * *

STATEMENT

The facts as found by the Tax Court may be stated as follows (Findings of Fact and Opinion of the Tax Court, Appendix, *infra*):

The taxpayer, a resident of Laton, California, filed his 1954 individual income tax return with the District Director of Internal Revenue, San Francisco, California. In that return, the taxpayer claimed a personal exemption and further an exemption for three other individuals consisting of a woman and her two minor sons. These individuals were not related to the taxpayer by either blood or marriage. These persons came to live in the taxpayer's home about March 5, 1954, and continued to reside there during the remainder of the taxable year 1954.

The Commissioner disallowed the taxpayer's claim for the three individuals who were not related to him by either blood or marriage because their principal place of abode was not the taxpayer's home during the entire taxable year 1954. The Tax Court found the Commissioner's determination to be correct and accordingly held the taxpayer deficient in income tax for 1954 in the amount of \$377.

SUMMARY OF ARGUMENT

The sole question in this case is whether for his calendar year 1954 the taxpayer is entitled under Section 152(a)(9) of the 1954 Internal Revenue Code to deductions for exemptions for Mrs. Leoni and her two minor sons, who were not related to the taxpayer by blood, marriage or adoption. These three non-related individuals became members of taxpayer's household on or about March 5, 1954, and resided there for the remainder of the taxable year. The Commissioner does not contest taxpayer's assertion that each of the three individuals earned less than \$600 during the year 1954, nor that over half of the support of each for that year was received from the taxpayer. Each of the exemptions was denied because none of the three individuals had his principal place of abode at the home of the taxpayer and was not a member of his household for the entire taxable year for which the exemptions are claimed.

The Tax Court was correct in upholding the Commissioner. The section of the 1954 Code, which for the first time included exemptions for non-related individuals who qualified under the new requirements, the regulation promulgated thereunder, and the Committee Reports of both the House and Senate, make it quite clear that an exemption was granted for a non-related individual only where taxpayer and such individuals live together in his household for the entire taxable year except for temporary absences due to special circumstances.

ARGUMENT

The Tax Court Correctly Held That the Taxpayer Was Not Entitled To Dependency Exemptions for the Taxable Year 1954 Under Section 152(a)(9) of the 1954 Internal Revenue Code for Individuals Who Did Not Commence To Maintain Their Principal Place of Abode In the Home of the Taxpayer and Become Members of His Household Until March, 1954

We submit that the Tax Court correctly denied the exemptions claimed for the three non-related individuals on the ground that none of them was a member of taxpayer's household nor had as his principal place of abode the home of the taxpayer "for the taxable year of the taxpayer".

Taxpayer's taxable year is the calendar year 1954. The individuals, not related to him, did not become members of his household until March 5, 1954, hence none qualifies for exemption under Section 152(a)(9) of the 1954 Internal Revenue Code, *supra*, the section under which the exemptions are claimed. This section provides:

SEC. 152. DEPENDENT DEFINED.

(a) *General Definition*.—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer * * *:

* * * * *

(9) An individual * * *² who, *for the*

² The omitted parenthetical clause, which was added by Section 4(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606, in Section 152(a)(9) which reads "(other

taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, * * * [Emphasis supplied.]

* * * * *

The case turns upon whether the phrase "for the taxable year of the taxpayer" as used in the above section means his entire taxable year.³ The statute, its history, the Regulations promulgated thereunder, and the committee reports all show that the quoted phrase means for the entire taxable year.

In drafting the 1954 Code, Congress in all material respects reenacted the provisions of Section 25(b) of the 1939 Code relating to exemptions granted, and at the same time added two categories for which theretofore no exemption had been granted.⁴ Section 151 of

than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer)" is in no way applicable to the case at bar.

³ Apparently the taxpayer feels that by showing that for a portion of 1954 the principal place of abode of the individuals in question was his home he has thereby satisfied the requirements of the Code Section. (Br. 4.) This argument completely fails to consider the question of whether dependent individuals who maintain their principal place of abode in the home of the taxpayer for a part of the taxpayer's taxable year must maintain this relationship for the entire taxable year of the taxpayer. The Tax Court, in holding that the relationship must exist for the entire taxable year, decided that "for the taxable year of the taxpayer" means his entire taxable year. (Opinion, Appendix, *infra*.)

⁴ The pertinent committee reports read as follows (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A41 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4178); S. Rep. No. 1622, 83 Cong., 2d

the 1954 Code, *supra*, allows a deduction for an exemption for each dependent as defined in Section 152. The general definition in Section 152 defines the term "dependent" as "any of the following individuals" over half of whose support "for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer". This is followed by eight different types of individuals, all related to the taxpayer by blood, marriage or legal adoption. Up to this point the 1954 Code requirements do not differ from those of the 1939 Code, Section 25(b). These two new categories are found in subsection (a) (9) of

Sess., p. 193 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4828)):

Section 152. Dependent defined

This section corresponds to section 25 (b) (3) of the 1939 Code but has several new provisions.

Subsection (a) corresponds to the first sentence in section 25 (b) (3) of the 1939 Code. It defines a dependent as in section 25 (b) (3) of the Code of 1939 as an individual, described in paragraphs 1 to 8 (subparagraphs A through H of section 25 (b) (3) of the 1939 Code) over one-half of whose support (for the calendar year in which the taxable year of the taxpayer begins) is received from the taxpayer. No substantive change is made as to such paragraphs. To the list of eligible individuals is added a ninth classification—any individual who is a member of the taxpayer's household and whose principal place of abode for the taxable year of the taxpayer is the home of the taxpayer, and a tenth classification—an individual who is a cousin of the taxpayer and who, for the taxable year of the taxpayer requires institutional care because of physical or mental disability and before receiving such care was a member of the same household as the taxpayer.

Section 152, involved here, and subsection (a)(10), which is not involved. In each of these two subsections there are added requirements not present in the general definition of "dependent" which clearly show that Congress was not granting exemptions under these subsections on the same basis as the first eight subsections of Section 152(a).

In subsection (9), quoted above, the non-related individual must have as his principal place of abode the home of the taxpayer and must be a member of that household "for the taxable year of the taxpayer". Subsection (10) relates to certain individuals related to the taxpayer who for the taxable year received institutional care, but requires that before receiving such care the individual must have been a member of the same household as the taxpayer.

The regulation⁵ specifically providing that an individual to qualify under Section 152(a)(9) must be an individual who lives with the taxpayer and is a member of taxpayer's household during the entire taxable year states (Section 1.152-1(b), *supra*):

⁵ The taxpayer claims that the instant section of the Regulations was not in effect in the taxable year 1954 (Br. 6-7.) There is no basis for this contention. The Secretary of the Treasury or his delegate has the authority to prescribe the extent to which any regulation relating to the internal revenue laws may be applied without retroactive effect. Section 7805(b) of the 1954 Code, *supra*. Obviously, if no such action is taken, the regulation will then be effective as of the same date as the Code section to which it relates. *Manhattan Co. v. Commissioner*, 297 U. S. 129, affirming 76 F. 2d 892 (C. A. 2d); *Automobile Club v. Commissioner*, 353 U. S. 180. The 1954 Code was not approved until August 16, 1954. Necessarily the Regulations thereunder followed later.

Section 152(a)(9) applies to any individual * * * who lives with the taxpayer and is a member of the taxpayer's household *during the entire taxable year of the taxpayer*. An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law. It is not necessary under section 152(a)(9) that the dependent be related to the taxpayer. For example, foster children and children awaiting adoption may qualify as dependents. It is necessary, however, that the taxpayer both maintain and occupy the household. The taxpayer and dependent will be considered as occupying the household *for such entire taxable year* notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, or vacation shall be considered temporary absence due to special circumstances. The fact that the dependent dies during the year shall not deprive the taxpayer of the deduction if the dependent lived in the household *for the entire part of the year preceding his death*. Likewise, the period during the taxable year preceding the birth of an individual shall not prevent such individual from qualifying as a dependent under section 152(a)(9). Moreover, a child who actually becomes a member of the taxpayer's household during the taxable year shall not be prevented from being considered a member of such household *for the entire taxable year*, if the child is required to remain in a hospital for a period following its birth, and if such child would otherwise have been a member of the taxpayer's

household during such period. [Emphasis supplied.]

As can easily be seen, when the regulation directs itself to the taxable year of the taxpayer, the phrase "entire taxable year" or a similar phrase expressing entirety has been consistently used. Furthermore, a large portion of the regulation is concerned with specifying certain situations that will not disqualify individuals from being construed to have maintained their abode at the taxpayer's home for the entire taxable year of the taxpayer. Certainly the instant situation in which a woman and her two minor sons became members of the taxpayer's household subsequent to March 4 of the taxable year at bar is by no means one of the instances in which the regulation construes a claimed dependent to be constructively present at the taxpayer's residence for the entire taxable year.

The Tax Court points out that to sustain the taxpayer the words "for the taxable year" would have to be construed to mean "for a part of", or "during some part of", or "at any time during"; also that in its ordinary meaning the word "for" as defined in Webster's Dictionary means "during; throughout; in or through the space of time of; to the extent of."

Most important, the instant regulation is perfectly consistent with the intent of Congress as expressed in the House and Senate reports pertaining to the effect of Section 152(a)(9) of the 1954 Code. The House report states the following in defining the Code section in question (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A41-A42 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4178)):

Section 152. Dependent defined

* * * *

Paragraph (9) is intended to apply only when the taxpayer and such other members of his household live together in such household *during the entire taxable year* (except for temporary absences due to special circumstances). The fact that such individual may be at college during the college term does not prevent the home of the taxpayer from also constituting the principal place of abode of such individual. However, such home will not be considered as the principal place of abode where the child establishes a separate habitation and only returns for periodic visits. Similarly, such home will not be considered as constituting the principal place of abode of a dependent of the taxpayer who is supported by the taxpayer for a part of the year in lodgings other than those occupied by the taxpayer even though such person may at various periods live in the household, unless the residence of the dependent in other lodgings is due to necessity such as illness. It is also intended that the household constitute the actual place of abode of the taxpayer and it is not sufficient that the taxpayer maintain the household without being an occupant thereof. For example, under paragraph (9) the taxpayer will be entitled to claim a foster child (who is not legally adopted) as a dependent (assuming the support and earnings tests are met) provided the foster child is a member of the taxpayer's household and lives in the taxpayer's home *for the entire taxable year*, except for vacations or time away at school. [Emphasis supplied.]

Moreover, the Senate report uses the identical language as the House report. S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 193-194 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4828).

Certainly there can be no question but that Congress meant that Section 152(a)(9) of the 1954 Code would be available to a taxpayer claiming a dependency exemption under this Code provision only if the dependent individual maintained his abode in the taxpayer's home and was a member of the taxpayer's household for the entire taxable year of the taxpayer. Consequently it seems clear that had Congress intended to grant exemptions for non-related taxpayers upon the same basis that they were granted for relatives,⁶ it would have been unnecessary for it to have included the phrase the interpretation of which is here involved, or to have changed the heading of Section 152.

To the best of our knowledge the court below rendered the initial judicial decision deciding the issue now on review. Although cases have decided other issues concerning Section 152(a)(9), some of which discussed the intent of Congress in adding this Code provision as it related to the question then at bar, these decisions offer no assistance to the question be-

⁶ In this connection it is to be noted that special rates of tax are given to heads of households. However, the statute specifically provides that a taxpayer, for this purpose, shall not be considered to be a head of a household by reason of an individual who would not be a dependent but for paragraph 9 or paragraph 10. See Section 1(b)(4) of the 1954 Code.

fore this Court.⁷ Nevertheless, a very recent Tax Court decision, relying principally upon the instant case and decided by the same judge that rendered decision here, has held that a dependent child awaiting adoption by a taxpayer who became a member of the taxpayer's household on February 11, 1955, and was not legally adopted until 1956, could not be taken as an exemption by the taxpayer in taxable year 1955 because the dependent child was not a member of the taxpayer's household for the entire taxable year of the taxpayer. *McMillan v. Commissioner*, 31 T. C. No. 116.⁸

⁷ *Bombarger v. Commissioner*, 31 T. C. No. 48; *Dewsbury v. United States*, 146 F. Supp. 467 (C. Cls.); *Turnipseed v. Commissioner*, 27 T. C. 758. The *Turnipseed* case is directly opposite to taxpayer's statement that "moral aspects" have no bearing as to whether Section 152(a)(9) is applicable. (Br. 5.) Although this matter was never questioned in the brief below nor commented on by the Tax Court and consequently is most likely not applicable to the case at bar, the *Turnipseed* case, Section 1.152-1(b) of the 1954 Regulations, and Congress in Section 152(b)(5) show that Section 152(a)(9) is not applicable if the claimed dependent's living in the taxpayer's abode has the effect of contravening the public policy of the local jurisdiction.

⁸ It must be noted that the primary purpose of introducing Section 152(a)(9) into the 1954 Code was to allow exemptions for foster children or children awaiting adoption if the dependent child was a member of the taxpayer's household for the taxpayer's taxable year. H. Rep. No. 1337, 83d Cong., 2d Sess., p. 18-19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4044); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 21 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4651).

CONCLUSION

For the aforementioned reasons stated herein, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Washington 25, D. C.

April, 1959.

APPENDIX

DOCKET NO. 64547

APPEARANCES

ROBERT WOODROW TROWBRIDGE, PETITIONER

For Petitioner:

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For Respondent:

DOCKET ENTRIES

1956

Oct 8—Petition received and filed. Taxpayer notified. Fee paid.

Oct 8—Copy of petition served on General Counsel.

Oct 29—Request for Circuit hearing in San Francisco, Calif., filed by petitioner. 10/29/56
Granted. Served 10/29/56.

Nov 20—Answer filed by Resp. Served 11/23/56.

1957

Oct 22—Notice of trial, January 20, 1958, at San Francisco, Calif.

1958

Jan 20—Trial had before Judge Tietjens on merits. Briefs due March 6, 1958; no replies.

Feb 20—Transcript of proceedings, January 20, 1958, filed.

Mar 3—Brief for Petr. filed.)

Mar 6—Brief for Resp. filed.) Served 3/7/58.

July 8—Findings of fact and opinion, filed. Judge Tietjens. Decision will be for Resp.

July 9—Decision entered, Judge Tietjens.

1958

- Oct 7—Petition for review by U.S.C.A. 9th Cir., filed by Petr.
- Oct 7—Proof of service of petition for review, filed.
- Oct 23—Designation of contents of record on review, with proof of service thereon, filed by Petr.
- Oct 24—Designation of additional portions of record on review, with proof of service thereon, filed by Resp.
- Nov 5—Order extending time for filing record on review and docketing petition for review to January 5, 1959. Served 11/7/58.

30 T. C. No. 88

TAX COURT OF THE UNITED STATES

ROBERT WOODROW TROWBRIDGE, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 64547.

Filed July 8, 1958.

Dependents—Sec. 152 (a) (9), I. R. C. 1954.
—*Held*: Claimed dependents who became members of taxpayer's household in March of 1954 and lived there the remainder of the year did not have their principal place of abode and were not members of the household "for the taxable year of the taxpayer". Dependency exemptions properly denied.

Robert Woodrow Trowbridge, pro se.

Edward H. Boyle, Esq., for the respondent.

TIETJENS, *Judge*: The Commissioner determined a deficiency in income tax for the year 1954 in the amount of \$377.

The only question for decision is whether petitioner could properly claim dependency exemptions for a woman and her two minor sons who lived in petitioner's home from March 5, 1954 through the remainder of the year.

FINDINGS OF FACT.

Petitioner is an individual residing in Laton, California. He filed his individual income tax return for 1954 with the district director of internal revenue in San Francisco, California.

On his 1954 return petitioner claimed exemptions for himself and for three other persons consisting of a woman and her two minor sons. They were not related to petitioner by blood or marriage. These persons came to live in petitioner's home about March 5, 1954 and continued to reside there during the remainder of the year.

The Commissioner disallowed the exemptions claimed for the three dependents because they were not related to petitioner by blood or marriage and did not have petitioner's home as their principal place of abode during the entire year 1954.

OPINION.

The only question raised in this case is whether the claimed dependents fall within the definition of a dependent contained in section 152 (a) (9), Internal Revenue Code of 1954. That section defines a dependent to be

An individual who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, or

The issue is narrowed to the meaning of the phrase "for the taxable year of the taxpayer". Concededly the claimed dependents did not live in petitioner's home during the entire year 1954. They did not live at petitioner's home nor become members of his household until March of that year. The Commissioner's Regulations, 1954 Code, section 1.152-1 (b), state, in part

Section 152 (a) (9) applies to any individual * * * who lives with the taxpayer and is a member of the taxpayer's household during the *entire taxable year* of the taxpayer. * * * The

taxpayer and dependent will be considered as occupying the house hold for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. * * *

[Emphasis supplied]

If the Regulations correctly interpret the Code, the Commissioner's action must be approved. We think the Regulations are correct.

To sustain petitioner's view we would have to construe the words "for the taxable year" as meaning "for a part of", or "during some part of", or "at any time during", the taxable year. But in its ordinary sense the word "for" as defined in Webster's New International Dictionary, Second Edition, means "Expressly duration of time or extension of space; during, throughout; in or through the space of time of; to the extent of." Most of these definitions, if applied here, indicate to us that the individuals claimed as dependents must have been members of petitioner's household throughout the taxable year in order to meet the statutory requirement for a dependent. They were not.

The interpretation placed on section 152 (a) (9) in the Regulations also finds support in the Report of the Ways and Means Committee of the House and the Report of the Finance Committee of the Senate where it is stated:

Paragraph 9 is intended to apply only when the taxpayer and such other members of his household live together in such household during the entire taxable year (except for temporary absences due to special circumstances).

H. Rept. No. 1337, 83d Cong., 2d Sess., (1954) p. A41; S. Rept. No. 1635, 83d Cong., 2d Sess., (1954) p. 193.

Petitioner has not shown error in the Commissioner's determination.

*Decision will not be entered for
the respondent.*

[Caption omitted]

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed July 8, 1958, it is

ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1954 in the amount of \$377.

Enter:

Entered Jul 9 - 1958

/s/ NORMAN O. TIETJENS
Judge.

No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

WM. H. NEBLETT,
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Counsel for Appellant.

FILED

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PAUL P. O'BRIEN, CL

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No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

Appellant Fred Stein was indicted March 5, 1958, by the Federal Grand Jury at Los Angeles, California. [Tr. pp. 1-6.] The indictment is in six counts.

Count One charges appellant with a conspiracy (18 U. S. C., Sec. 371) between him and three "unindicted co-conspirators," Quentin Browning, Clarence Winfrey and Celeste Winfrey. It is alleged in the indictment that the conspiracy was formed on or about January 1, 1956, and ended on or about July 11, 1957. The conspirators are charged with receiving, concealing, transporting and facilitating the concealment and transportation of heroin and of concealing and facilitating the sale of heroin. Seventeen overt acts are alleged as having occurred between January 21, 1956, and July 11, 1957.

Count Two charges appellant (21 U. S. C., Sec. 174) with having on or about January 21, 1956, sold and facilitated the sale of approximately two ounces of heroin to one of the "unindicted co-conspirators," Quentin Browning. Count Two¹ is a repetition of the first overt act charged in Count One.

Count Three charges appellant (21 U. S. C., Sec. 174) with having on or about January 21, 1956, facilitated the sale of approximately two ounces of heroin to two of the "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey. Count Three is a repetition of overt act No. 1 (Count One) and a repetition of Count Two except in Count Three the sale of the same two ounces of heroin is charged as having been made by appellant to the "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey, instead of to "unindicted coconspirator," Quentin Browning.

Count Four charges appellant (21 U. S. C., Sec. 174) with the sale and facilitation of the sale on February 15, 1956, of approximately three ounces of heroin to "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey. Count Four charges as a specific offense overt acts Nos. 3, 4, 6 and 7 of Count One.

Count Five charges that appellant (21 U. S. C., Sec. 174) on September 10, 1956, sold and facilitated the sale of approximately five ounces of heroin to "unindicted coconspirator," Quentin Browning. Count Four charges as a specific offense overt acts Nos. 8, 9 and 10 alleged in Count One.

¹The Court dismissed Count Two at the trial.

Count Six charges that appellant (21 U. S. C., Sec. 174) on March 3, 1957, sold and facilitated the sale of approximately three ounces of heroin to "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey. Count Six charges as a specific offense overt acts Nos. 15 and 16 alleged in Count One.

The case was called for trial September 16, 1958, before the Honorable Peirson M. Hall, Judge, with a jury. [Rep. Tr. p. 4.] The jury returned its verdict September 22, 1958, finding the appellant guilty as charged on Counts One, Three, Four, Five and Six. [Rep. Tr. p. 67.] Counsel for appellant, Paul W. Sweeney, announced that he would file a motion for new trial. (Rule 33, F. R. Cr. P.; 18 U. S. C.) The Court denied appellant the right accorded him by Rule 33 to file his motion for new trial within 5 days after the verdict. The Court stated that it would hear a motion for new trial if the motion were filed in the afternoon of that day, September 22. At the time the Court made that declaration it was 3:40 P.M. [Rep. Tr. pp. 639-640.] The Court then continued the matter of the motion for new trial until 11:00 o'clock September 23, 1958. [Rep. Tr. p. 640.]

The next day, September 23, the Court denied appellant's motion for new trial and motion for judgment notwithstanding the verdict. [Rep. Tr. p. 70, lines 12-14.] Immediately after the denial of motion for new trial and judgment notwithstanding the verdict and on September 23 the Court rendered its judgment sentencing the appellant to 20 years on Count One, to 20 years on Count Three, the sentences on these two counts to run concurrently, 10 years on Count Four, 10 years on Count Five and 10 years on Count Six to run consecutively with each other and consecutively with the concurrent 20-year sen-

tences on Counts One and Three, making a total sentence of 50 years. [Tr. pp. 70-71.]

Appellant Stein filed his notice of appeal to this Court September 26, 1958. [Tr. p. 74.] Stein has been committed to and is now in the custody of the United States Marshal for the Southern District of California pursuant to order of the District Court made October 15, 1958. [Tr. p. 76.] Stein has been denied bail pending his appeal by the District Court and by this Court. The District Court had jurisdiction. (Title 18 U. S. C. Sec. 3231.)

The jurisdiction of this Court is invoked under Sections 1291 and 1294(1) of Title 28, U. S. C.

II.

PERTINENT STATUTES.

This case involves Title 18, U. S. C., Section 371, and Title 21, U. S. C., Section 174, which statutes are quoted below:

Title 18, U. S. C., Section 371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, U. S. C., Section 174: “Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violaton of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

“For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.”

III.

STATEMENT OF THE CASE.

Appellant Stein, a man 51 years old [Rep. Tr. p. 649] appeals from a judgment sentencing him to 50 years in the penitentiary. The Court intended the 50-year sentence to be a life sentence as the Court stated when sentencing appellant to 50 years: “The Court feels justified

in completely isolating him (appellant) from society.” [Rep. Tr. p. 651, lines 22-23.] The Court could not grant the appellant probation or suspend his sentence. Appellant is not entitled to parole. (21 U. S. C., Sec. 174; 26 U. S. C., Sec. 7237(d).) The 50-year sentence is more severe than a life sentence. A prisoner with a life sentence may be paroled. Appellant would, if he should live so long, be 101 years old when his sentence expires. If appellant’s sentence were shortened for good behavior to three-fourths of his 50-year term, appellant would be 88 years old at the time of his release.

When the case was called for trial, Attorney Paul W. Sweeney, who appeared for appellant at the trial, moved the Court for a continuance [Rep. Tr. pp. 4-8] upon the grounds that other counsel who had appeared for appellant, Harry Weiss and Arthur Sherman, were not present; that he, Sweeney, was not mentally or physically able to go ahead with the trial as he, himself, was at the time charged in the Superior Court of Los Angeles California, with a violation of the state Narcotics Law (*Cal. Health and Safety Code*, Sec. 11500) and that he was also charged in the same information with offering a bribe to state and county officials in connection with the narcotics charge (*Cal. Penal Code*, Secs. 67 and 67½); that a continuance should be had so as to permit the appellant to obtain other counsel in place of Sweeney as he, Sweeney, because of his distressed condition of mind and because of the large amount of adverse publicity which had appeared concerning his, Sweeney’s, alleged felonies, did not feel competent to try the case for appellant; that he was appearing for the appellant at the opening of the trial for the sole purpose of getting a continuance in order that the appellant might obtain other coun-

sel; that he, Sweeney, could not properly defend appellant because of the probability that in the defense of appellant, he, Sweeney, might damage the defense of his own narcotics case and bribery case pending in the Superior Court at Los Angeles. The Court instead of granting the motion for a continuance in effect compelled the appellant to sign a designation of Sweeney as his counsel. [Rep. Tr. pp. 64-66.]

The Court compelled the appellant to file and to present his motion for new trial within 19 hours after the verdict was returned, refusing to give appellant the five days allowed a defendant by Rule 33 of the Federal Rules of Criminal Procedure to make a motion for new trial. [Rep. Tr. pp. 639-646.]

Appellant was convicted solely upon the testimony of three admitted accomplices, Quentin Browning, Clarence Winfrey, and his wife Celeste Winfrey. There is no other evidence of any sort, directly or circumstantial, that Stein committed any of the offenses charged in the indictment other than the testimony of these three accomplices. Appellant had met Browning and Clarence Winfrey when all three of them were serving terms in McNeill Island for narcotics violations. Browning lived in San Francisco. Browning was arrested in San Francisco on a narcotics charge in the latter part of September or the early part of October, 1956. [Rep. Tr. p. 151.] Celeste Winfrey, the wife of Clarence Winfrey, living in Los Angeles, was arrested on a narcotics charge March 12, 1957. [Rep. Tr. p. 223.] The Federal officers who arrested Browning evidently promised him immunity if he would act as an informer. Browning, having served with Stein in the penitentiary in McNeill Island on narcotics charges and with Clarence Winfrey on a similar charge,

selected Stein as a likely prospect upon whom to lodge the blame and went to work with his former prison mate, Clarence Winfrey, to accomplish his purpose. [Rep. Tr. pp. 87, 88, 90, 132, 135, 140, 249, 453.]

Browning was unable to get any credible information from Winfrey which would tend to incriminate Stein, so in order to further the plan, Browning made some deals with Clarence Winfrey and his wife Celeste Winfrey. Celeste was arrested in Los Angeles on a Federal narcotics charge, March 12, 1957. [Rep. Tr. p. 223.] The stage was now set to incriminate Stein if possible. Browning was under arrest [Rep. Tr. p. 147] and Celeste Winfrey, Clarence Winfrey's wife, was under arrest, so in their language they told the officers everything. [Rep. Tr. pp. 148, 150, 242, 243.]

Clarence Winfrey, Celeste Winfrey's husband, stated on cross-examination that he had not mentioned appellant to the narcotics officers until after his wife, Celeste Winfrey, had been arrested on a federal narcotics charge. [Rep. Tr. p. 244.] In order to help his wife out of the difficulties arising from her arrest, Clarence Winfrey began working with the Government. [Rep. Tr. pp. 241-242.] The Government gave him \$2,100 for the purpose of trying to make a buy from appellant. [Rep. Tr. p. 241.] Winfrey took the \$2,100 from officers with the understanding that if he could make a buy from appellant he would help his wife, Celeste, by so doing. [Rep. Tr. p. 243.] It appears from Winfrey's testimony that all that was done after his wife was arrested and all he told the officers was told after his wife's arrest with the sole idea of helping his wife to escape trial. Winfrey was extremely indefinite in his testimony and claimed that he had no recollection whatsoever as to the times mentioned in the indictment. [Rep. Tr. pp. 246-247.]

Browning's testimony is, like Winfrey's, colored by the effort to save himself from prosecution for his arrest. Browning was arrested in San Francisco by Federal narcotics officers some time in September or October, 1956. [Rep. Tr. p. 151.] Browning, in order to save himself from prosecution for the sale of narcotics for which he had been arrested, made some sort of deal with the Federal officers to catch appellant. From Browning's testimony we glean that, if he could lay the blame upon someone as a source of the narcotics charge, the officers would allow him to go free. [Rep. Tr. pp. 147-161.]

Browning brought in the name of Stein the day he was arrested. [Rep. Tr. p. 159.] The appellant had a prior Federal narcotics conviction; so did the main witnesses against him, Quentin Browning and Clarence Winfrey. Browning told the Federal officers that he would testify against appellant if appellant should be indicted. [Rep. Tr. p. 149.] Evidently the officers did not think they could rely upon the testimony of this accomplice who had served a term in McNeill Island for a narcotics charge, so they attempted to have Browning, through Winfrey, another narcotics loser, make a buy from Stein. At the time Browning was out on bail on his San Francisco arrest. [Rep. Tr. p. 152.] The arraignment of Browning before the United States Commissioner at San Francisco and the fixing of bail and his release on bail ended the case against Browning, if he would implicate appellant. Browning's case seems never to have been presented to the Grand Jury in San Francisco. [Rep. Tr. p. 153.] Nor the case against Celeste Winfrey in Los Angeles.

Appellant was convicted on Counts One, Three, Four, Five and Six of the indictment solely upon the testimony of the accomplices, Browning and Winfrey, and the accomplice Celeste Winfrey, Clarence Winfrey's wife.

There is no evidence in the record of anyone ever overhearing any conversations between Browning and appellant, Clarence Winfrey and appellant, or Celeste Winfrey and appellant. There is not a word of evidence in the record outside of that of the accomplices, that appellant sold or facilitated the sale, or otherwise trafficked in narcotics other than the testimony of those three. No other witness testified to the passage of narcotics between anyone and appellant or the passage of any money between appellant and any one of these three, other than the three accomplices. No marked money was discovered in appellant's possession. No narcotics were found in his possession. He has been convicted solely upon the testimony of the three admitted accomplices, called "unindicted co-conspirators," the two principal ones of which were former convicted felons on narcotics charges and two of whom were under arrest for the sale of narcotics in which the Government seems to have had them cold and from which they could extricate themselves only by furnishing testimony, of which there is not one word of corroboration in the record that appellant was their source of supply.

Appellant Stein took the stand in his own defense and testified. [Rep. Tr. pp. 409-487.] While appellant admitted that he knew Browning and Winfrey up north, which meant to them McNeill Island, he denied that he had ever had any transaction of any sort in narcotics with them or either of them or with Celeste Winfrey. [Rep. Tr. pp. 415, 419, 432, 433, 442, 448.]

When the case was called for trial September 16, 1958, the only attorney designated of record for appellant by an appearance praecipe was Harry E. Weiss, 448 South Hill Street, Los Angeles. This praecipe was filed April 7, 1958, and was signed by appellant Fred Stein and by his attorney, Harry E. Weiss. [Tr. p. 15.] Paul W.

Sweeney had appeared several times in the case before that on motions, continuances, and such matters for appellant, but he appears to have been doing so for Harry Weiss, as there was no designation of Sweeney as counsel and no appearance praecipe signed until after the opening of the trial September 16, 1958, when the Court in effect compelled Stein to sign a praecipe dated September 16, 1958. [Rep. Tr. pp. 67-69; Tr. p. 35.]

The appellant contends that he did not have a fair trial; that the evidence was insufficient to sustain his conviction on Counts One, Three, Four, Five and Six, upon which he was convicted; and, that the Court erred in its rulings on the admission and rejection of evidence.

IV.

ASSIGNMENT OF ERRORS.

1. The trial court erred in denying appellant's motion for a continuance made at the opening of the trial by Paul W. Sweeney, who advised the Court that he was appearing for appellant only for the purpose of obtaining a continuance upon the grounds: (a) That he, Sweeney, was not mentally or nervously in any condition to try the case because he had recently received some very unfavorable publicity widely covered by radio, television and newspapers. While Mr. Sweeney was somewhat vague in reference to his difficulties he undoubtedly referred to his arrest by State officers August 29, 1958, for possession and transportation of narcotics in violation of Section 11500 of the Health and Safety Code of California, a felony, and for his arrest for offering a bribe to the arresting officers in violation of Sections 67 and 67½ of the Penal Code of California, a felony, which charges were pending and untried at the time the appellant's case was

called;² (b) That he, Sweeney, did not want to defend appellant on the narcotics charge because the case might get some publicity and such publicity would materially affect Sweeney's defense at his trial on the narcotics and bribery charges which were pending against him in the Superior Court for Los Angeles; (c) That at the opening of the trial when Sweeney sought the continuance the only designation and praecipe of counsel on file for appellant was the one filed April 7, 1958, five months before the trial, signed "Fred Stein, Defendant" and "Harry E. Weiss, Attorney at Law," which has never been revoked. [Tr. p. 15.]

2. The Court erred in requiring appellant, after the trial had opened and after the motion for continuance had been made and denied, to designate Mr. Sweeney as his counsel and have Mr. Sweeney sign the praecipe, thus in effect compelling the appellant against his will to accept Mr. Sweeney as his attorney to represent him at the trial [Tr. p. 35] after Mr. Sweeney had confessed that he could not do a good job of defending appellant for fear his defense of the narcotics case might materially affect the defense to the narcotics charge pending against Sweeney in the state court.

The importance of Assignments of Errors numbers 1 and 2 requires extensive quotations from the reporter's transcript, so counsel believe, in order that full compliance may be had with Rule 18(d) of this Court. Accordingly we do so below :

"Mr. Sweeney: Your Honor, this is a motion to continue this matter based on three reasons:

²The type of publicity to which attorney Sweeney referred appears in the appendix where two newspaper articles on the subject are reproduced, one from the Los Angeles Times of August 30, 1958, and the other from the Los Angeles Tribune of Friday, September 5, 1958.

The first being that we were just aware of the fact that we were going to trial Friday of last week. We have been laboring under the impression, and offers have been made of a plea over in the State court, and this matter was discussed, or an offer was made, not with Mrs. Bulgrin, in fairness to her, because she was away on vacation—I think she does know something of mention being made of a plea over in the State court—there was a suggestion, because of the defendant's cooperation in the case of United States vs. Michael Cohen that was tried before Judge Clarke, that his cooperation in not testifying in behalf of Mr. Cohen, which I informed the Government of at the time that he was not going to testify in behalf of Mr. Cohen—

The Court: He did testify, did he not?

Mr. Sweeney: No, he did not. That was his brother. He did not. He was not available. Possibly there is some consideration in that.

Then there was some further discussion about the possibility of him testifying for the Government in this matter. As the court was aware, I also testified for the Government against Michael Cohen, so this matter, if we had known it was going to trial, we would have tried him many, many months ago before Judge Clarke, where the case was originally scheduled, but it was continued over pending this cause of United States v. Michael Cohen pursuant to—well, the joint motions were made, or either he made the motion and they were acquiesced in by the Government, to have these matters continued.

As of last week there was still another question pending about his testimony for the Government, and we did not prepare for trial because there had been an offer made—well, I will say, in all fairness, it wasn't an offer made but there was some discussion—

about whether or not he was going to be allowed to go to the State court to plead to a one-count indictment that was to be sought over there.

That did not materialize, as I understand it. Discussion was had with Mr. Waters, and I am informed, and I was informed Friday, that we would have to go to trial.

Now I am totally unprepared to go to trial in this matter, thinking that this might be worked out in the State court and so we did not prepare our defense.

Secondly, with reference to this trial memorandum, that I received today, I see that it is at variance materially with the indictment, or the facts of the indictment, in that the indictment alleges certain overt acts alleged to have been committed by Fred Stein as a part of the indictment, and when we were before Judge Clarke we did prepare defenses toward those overt acts, and in reading this synopsis of the facts presented to me today in the trial memorandum, it varies materially in the material facts that they intend to prove.

The Court: That variation can be taken care of by appropriate objections to the introduction of evidence, if it is material.

Mr. Sweeney: They are different overt acts which we have not had any time at all to prepare or defend against.

The Court: If they are alleging different overt acts than that the evidence would not be admissible on it.

Mrs. Bulgrin: I don't think that is quite true, your Honor, but I didn't want to interrupt Mr. Sweeney on his presentation.

Mr. Sweeney: That is my impression of the matter.

Thirdly, there is a question of the recent publicity which I have received in this affair over on the State side by my arrest on this—what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

The Court: That occurred several weeks ago?

Mr. Sweeney: It occurred two weeks ago." [Rep. Tr. p. 4, line 22, to p. 8, line 2.]

After making the motion and the Court announced that the case would go to trial that morning of September 16, 1958, Mr. Sweeney said to the Court:

"Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial.

The Court: You have been the attorney for this defendant since he was indicted.

Mr. Sweeney: No. We have had substitution of attorneys.

Mrs. Bulgrin: Mr. Sweeney was the attorney at least in—when did I first talk to you about it?

Mr. Sweeney: I think Mr. Weiss was the first attorney.

The Court: Russell Parsons.

Mr. Sweeney: Then it was Mr. Weiss.

The Court: Mr. Weiss.

Mrs. Bulgrin: I think as of April 28th, when I got the case, your Honor, that Mr. Sweeney was the attorney.

Mr. Sweeney: I don't think there is any designation filed.

The Court: Here is Paul Sweeney.

Mr. Sweeney: What date was that?

The Court: April 28, 1958.

Mrs. Bulgrin: My assignment date was on 6-17-58 and Mr. Sweeney appeared in court then.

Mr. Sweeney: I am not denying the fact that I have appeared and represented the defendant. I just wanted the record to indicate my position in the matter.

The Court: I am sorry that I cannot agree with you, counsel. We will go to trial." [Rep. Tr. p. 9, line 25, to p. 11, line 2.]

After the jury had been empanelled the trial court called counsel to the bench outside the hearing of the jury, and the following quotations from the transcript, pages 60 through 68, show the further grounds on which the motion for continuance was based:

"The Court: Very well.

Will counsel approach the bench, please, with the defendant.

(The following proceedings were had between court and counsel at the bench, with the defendant present, outside the hearing of the jury):

The Court: In the records here it appears as though you first appeared for this defendant on March 10, 1958, that thereafter an appearance praecipe was filed by Harry Weiss on April 7th. There

does not appear to be a substitution of counsel. You appeared again on April 28th and have since from time to time appeared for this defendant in all matters.

Is Mr. Paul Sweeney your counsel, Mr. Stein?

The Defendant: Your Honor, I would like to get another attorney.

The Court: Has he been your attorney?

The Defendant: Yes, he has appeared for me here.

The Court: Has he been your attorney in this case?

The Defendant: No, he has not.

The Court: Was he your attorney on March 10th?

The Defendant: He has made the appearances here.

The Court: Was he your attorney? Did you authorize him to appear for you?

The Defendant: Yes.

The Court: Did you authorize him to appear here at the subsequent times that he did appear?

The Defendant: No. He came up. The Government, I understand, asked for the postponement and that Mr. Sweeney was to make the motions, and he called me—" [Rep. Tr. p. 60, line 15, to p. 61, line 19.]

"The Court: Who is your lawyer?

The Defendant: Well, Mr. Weiss was my attorney up until when Mr. Paul Sweeney made his first appearance and Mr. Weiss stepped out.

The Court: Up until Mr. Sweeney appeared?

The Defendant: Yes, sir.

The Court: Mr. Sweeney has been your attorney since June 17?

Mr. Sweeney: We have been co-counsel I think together at the time of the appearance. We were co-counsel at the time of trial setting.

The defendant informs me that since that time Mr. Weiss was no longer representing him.

The Defendant: That is right.

Mr. Sweeney: I asked him about that today, whether he was going to help try this matter or not.” [Rep. Tr. p. 62.]

* * * * *

“The Court: Have you since discharged Mr. Sweeney?

The Defendant: We discussed it.

The Court: Have you discharged him?

The Defendant: No. That was for the continuance which was for today so I could get other counsel.

The Court: No, this is not August 12th. June 17th to August 12th I do not find any minute in the file since that date. You were here in this court on August 12th and secured a continuance for resetting.

Mr. Sweeney: Yes, I did. I appeared for that.

The Court: And it was set to this date.

Mr. Sweeney: It was set to this date.

The Court: He was authorized to represent you then?

The Defendant: Yes.

The Court: You have made no move to get any other counsel in the meantime?

The Defendant: I have, yes.

The Court: Have you secured any other counsel?

The Defendant: Yes, sir.

The Court: Yes?

The Defendant: Yes.

The Court: You knew that this case was set on August 12th at this date.

The Defendant: Mr. Sweeney and I discussed it and he told me he wasn't capable, in view of his troubles, to give me the proper defense that I was entitled to. Yes, sir. I talked to some other people in regard to getting another attorney." [Rep. Tr. p. 63, line 7, to p. 64, line 9.]

* * * * *

"The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

The Defendant: (Pause.)

The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

The Defendant: Yes.

The Court: You do or do not?

The Defendant: I will sign it.

The Court: This is dated March 10th.

Mr. Sweeney: I don't know whether you should consult someone else or not.

(Conference between counsel and the defendant.)

Did you make a telephone call this afternoon to try to get other counsel?

The Defendant: Yes.

Mr. Sweeney: Did you get him?

The Defendant: No.

Mr. Sweeney: There is no doubt in my mind but that Harry Weiss and myself were representing him at all those times. Now when I talked about representation that was since September, whenever the publicity came out about me, and then I called him

and asked him—well, he called me and asked, did I want to continue, and that is the only time the matter of attorneys has come up. At all times though I did think that I was representing him along with the offices of Harry Weiss.

The Court: Who is your lawyer?

The Defendant: I talked to Mr. Weiss.

The Court: No, who is your lawyer, not who you talked to. Who is your lawyer?

Mr. Sweeney: I am one of them.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes.

The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. I will declare a few moments' recess, before you put any witness on the stand.

Mrs. Bulgrin: Yes, your Honor.

The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.

Mr. Sweeney: All right, sir." [Rep. Tr. p. 64, line 16, to p. 66, line 6.]

* * * * *

"The Court: Is Harry Weiss one of your lawyers?

The Defendant: Yes, sir.

The Court: I will declare a recess. The clerk will call Mr. Weiss and get him over here, wherever he is.

The Defendant: I talked to Mr. Weiss—

The Court: Otherwise I will send the United States Marshal for him.

Is there a United States Marshal present?

The Clerk: Yes, your Honor.

Mr. Sweeney: Let me make a call to Mr. Weiss, your Honor. I am going to represent this defendant and I am going to also call Mr. Weiss and find out just what his position is in the matter.

The Court: Mr. Weiss had better get over here. This is not the first time that this has happened, and I sort of have a feeling that Mr. Weiss is playing horse with the courts.

Mr. Sweeney: No, your Honor. In all fairness to Mr. Weiss, he advised me Friday that he did not think that he was going to appear in this matter and asked me what I was going to do in the matter, and at that time I advised Mr. Weiss that I was going to seek a continuance in order for Mr. Stein to get another attorney in light of my feeling about this thing, if for no other reason. I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are.

The Court: It is up to the defendant to make up his mind.

Mr. Sweeney: That I know. I don't think Mr. Weiss is in any way trying to avoid this.

The Court: We went through one case, not before me but before another judge, where Mr. Weiss' office represented a client, they appeared repeatedly before three different judges, they took six days to try it, the defendant was convicted and when it came time for sentence the defendant got up and said that he was not his lawyer at all and had never retained him.

The Court: I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir.

The Court: Very well. You can date that as of today.

The Clerk: Shall I get a new blank, your Honor?

The Court: No, that is all right. Strike it out and date it as of today.

Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?

The Defendant: Yes, sir.

The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein.

Mr. Sweeney: I think by tomorrow we are going to have another counsel that I will associate in the matter." [Rep. Tr. p. 66, line 14, to p. 68, line 22.]

3. The refusal of the Court to grant a continuance of the trial so that the appellant might secure other counsel to take the place of Sweeney, who had confessed his incompetence, denied the appellant a fair trial in that it denied him the right to select his own counsel and forced him to trial with incompetent counsel and one not of his own choosing. Among the many evidences of Sweeney's incompetence, the following are important:

(a) Attorney Sweeney failed to move the Court after the Government's witnesses, Quentin Browning, Clarence Winfrey, Celeste Winfrey, William C. Gilkey, William R. Farrington, James H. Mulgannon and Lawrence Katz, had testified to compel the Government to produce any statement made by the witnesses, and each of them, which

statement or statements relate to the subject matter on which the witnesses and each of them had testified. (18 U. S. C., Sec. 3500(b).)³

(b) Attorney Sweeney failed to object to questions by Government's counsel and by the Court designed to elicit defendant's income and sources of income during the periods of time covered by the charges in the indictment. [Rep. Tr. pp. 449-451.]

(c) Attorney Sweeney failed to object to the Court's remark during the course of the trial relative to the impeachment of defendant by showing his former conviction of a felony in that such remarks were too broad and prejudicial. [Rep. Tr. p. 452.]

(d) Attorney Sweeney failed to object to or move to strike the testimony elicited on the Court's introduction concerning the claim by the Government that the appellant was a bootlegger in prohibition days. [Rep. Tr. p. 458.]

(e) Attorney Sweeney failed to object to the questions of the Government relative to the claim that he was engaged in making horse racing bets and using the testimony to the detriment of appellant and which had the effect of prejudicing the jury against him. [Rep. Tr. pp. 460-462.]

³“(b) After a witness called by the United States (in a criminal case) has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.”

(f) Attorney Sweeney failed to protect appellant's rights by requesting the Court to give appropriate instructions relative to the alibis on Counts Five and Six proved by the defense and which might have brought about a different verdict of the jury on all counts of the indictment.

(g) Attorney Sweeney failed to recognize the importance of the testimony of the Government's main witness, Browning, that the so-called partnership between appellant and Browning for the handling of narcotics absolutely terminated in May, 1956, and to object to and move to strike all testimony as to the overt acts Nos. 8 to 17, inclusive [Tr. p. 3], occurring subsequent to May, 1956, and to request appropriate instructions to the jury on this subject.

(h) Attorney Sweeney failed to require government's counsel to fix the time and object to the testimony of Celeste Winfrey to the effect that appellant delivered her packages similar to the ones she first described eight or nine times prior to her arrest. [Rep. Tr. p. 261.]

(i) Attorney Sweeney failed to protect appellant's rights by failing to request the Court to give appropriate instructions on the law relating to conspiracy and to the law relating to an accomplice in view of the evidence in this case which necessitated the giving of such instructions. [Rep. Tr. pp. 521-527.]

(j) Attorney Sweeney failed at the appropriate time to take exception to the Court's instructions and permitted the erroneous instructions on the subject of accomplices and conspiracy and alibis to go unchallenged. [Rep. Tr. pp. 524-527, 601.]

(k) Attorney Sweeney failed to make a motion to acquit at the close of the case.

(l) Attorney Sweeney failed to produce vital and material evidence that appellant was in New York from the 5th to the 19th of September, inclusive, 1956. [Rep. Tr. pp. 373-378, 434.] The appellant offered to prove an alibi that he was in New York on September 10, 1956, which is the time laid in Count Five. Browning testified in support of Count Five [Rep. Tr. p. 124] that he came down from San Francisco to Los Angeles at the time charged in Count Five, purchased five ounces of heroin from appellant and took the heroin back to San Francisco and sold it.

To prove that appellant was in New York at the time, Sweeney offered a letter from Vincent J. Dolzen, the general manager of the Hotel Seymour, 50 West 45th Street, New York, dated April 18, 1958. [Deft. Ex. E for iden.] Defendant's Exhibit E showed that Stein was in New York City at the Seymour Hotel at all times from September 6 to September 19, inclusive, 1956, which would have been a complete answer to Browning's testimony that he purchased five ounces of heroin from appellant on September 10th. Appellant denied the alleged sale and all other alleged sales to Browning and to the Winfreys or anyone else. [Rep. Tr. p. 448.]

The Court sustained the Government's objection to the admission of this letter which would have been a complete acquittance of appellant on Count Five. The Court sustained the objection to the letter on the ground that the letter was hearsay. Attorney Sweeney or Attorney Weiss or Attorney Sherman, or some of the multiple attorneys for the appellant who have been connected with

the case, had the letter in their possession from its date of April 18, 1958. Any one of them should have known that it was inadmissible as hearsay but for some inexplicable reason the deposition of Vincent J. Dolzen was not taken, nor was he asked to appear as a witness on behalf of defendant. If Dolzen's deposition had been taken or had he appeared as a witness it would have established the falsity of Browning's testimony as to the alleged sale of September 10, 1956, for which he claims he paid appellant \$3,000 and would have required a jury to treat the rest of his testimony with suspicion.

4. The Court erred in admitting in answer to the question:

"The Witness (Browning): And Mr. Winfrey had said that he was interested in the stuff if the quality was what it was supposed to be."

Objection:

"Mr. Sweeney: Your Honor, I move that that conversation be stricken. There is no foundation shown that that was in the presence of this defendant." [Rep. Tr. p. 87.]

"The Court: And conversations out of the presence of one of the other conspirators are admissible if there is sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed . . . They can join a conspiracy or they can drop out. She (the District Attorney) may be able to show that they joined. The objection is overruled." [Rep. Tr. pp. 87-88.]

5. The Court erred in receiving over objection of appellant the testimony of witness Browning in answer to the question, approximately how many ounces of heroin Browning obtained from Stein.

Objection:

“Mr. Sweeney: I object to that, your Honor, as leading and assuming facts not in evidence. I think he said it was a partnership, that it was his own.”
[Rep. Tr. p. 109.]

The testimony received was:

“A. I sold ten to one, three, that is thirteen, sold twelve, that is twenty-five, and plus the business that he had done with Mr. Winfrey and another time twenty-five all together 51.” [Rep. Tr. pp. 109-110.]

6. The Court erred in receiving the testimony of the witness Clarence Winfrey over the objection of appellant’s counsel as to the next time (after February, 1956) that he purchased any of the substance from Mr. Stein.
[Rep. Tr. p. 215.]

Objection:

“Mr. Sweeney: I move that be stricken as not responsive to the Court’s question. The testimony admitted was, ‘Several times I have seen him during the year.’ ”

7. The Court erred in admitting the testimony of the witness Clarence Winfrey over the objection of appellant’s counsel to the question as to how many occasions were there in January or February, 1957, that Clarence Winfrey bought merchandise from Mr. Stein.

Objection:

“Mr. Sweeney: Your Honor, I object to that. It assumes a fact not in evidence. He doesn’t remember what date at all in 1957.”

The testimony admitted was:

“I don’t know, maybe I saw him three or four times in that time.”

Winfrey in response to this line of questions testified that on those occasions he bought merchandise from Stein; that on or about March 3 he bought 3 ounces from Stein. [Rep. Tr. p. 219.]

8. The Court erred in receiving the testimony of witness Clarence Winfrey over the objection of appellant's counsel in answer to the question as to whether or not Clarence Winfrey bought over three ounces at a time from Mr. Stein.

Objection:

"Mr. Sweeney: Objected to as having been asked and answered."

The testimony received was:

"On some occasions I might have." [Rep. Tr. p. 220.]

9. The Court erred in admitting Government Exhibits 2A and 2B, containing a package of heroin, over the objection of appellant's counsel.

Objection:

"I will object for the purpose of the record."

The substance in question was claimed to have been purchased by a Mr. Beard from Celeste Winfrey and purchased by a Government agent from Beard. [Rep. Tr. pp. 330-334.]

10. The Court erred in receiving the testimony of the Government agent Gilkey over the objection of appellant's counsel to questions concerning the time that Gilkey testified he saw Mr. Beard go in the direction of Celeste

Winfrey's house, if he had given Beard any money and he testified that he gave him \$100 of official advance funds on which serial numbers had been noted and that he saw this money again shortly after the arrest of Celeste Winfrey on March 12, 1957, and that it was the same money given to Beard. [Rep. Tr. pp. 335-337.]

The objection was:

"Mr. Sweeney: I would like the record to note the objection to the introduction of the evidence on the grounds that there has been no connection between the defendant Fred Stein and the narcotics that was purchased from Mr. Beard, there has been no connection between Mr. Beard and Mr. Stein by way of direct testimony, and therefore we note our objection." [Rep. Tr. p. 335.]

11. The Court erred in overruling objections of appellant's counsel to testimony by the witness Evelyn Stein on cross-examination concerning appellant's occupation for eight or nine years as not proper cross-examination and immaterial.

Objection:

"Mr. Sweeney: Your Honor, I am going to object to this line of questioning as improper cross-examination. I don't think any of these points were gone into on direct. I think the direct was limited to two specific trips and not to any general married life or general background of these parties. I therefore think it is not only immaterial but it is improper cross-examination."

The testimony related to the manner in which Mr. Stein handled his automobile business and whether he

worked with dealers or independently on his own account. [Rep. Tr. pp. 382-384.]

12. The Court erroneously instructed the jury on the law of a conspiracy. [Tr. pp. 65-66.]

13. The Court erred in denying appellant's motion for a new trial. [Motion, Tr. p. 68; Denial, Tr. p. 70.]

14. The Court erred in fixing the total sentence of appellant at 50 years, which amounts to cruel and inhuman punishment within the Eighth Amendment to the Federal Constitution. [Rep. Tr. p. 651.]

15. The Court erred in denying appellant's motion, made at the conclusion of the Government's case, to acquit the appellant on Counts One, Three, Four, Five and Six. [Rep. Tr. pp. 349-354.]

V.

SUMMARY OF ARGUMENT.

The refusal of the Court to grant appellant time to secure counsel to defend him at the trial denied the appellant a fair trial within the meaning of the Sixth Amendment to the Federal Constitution.

Glasser v. United States (1942), 315 U. S. 60,
62 S. Ct. 457.

The right of an accused to counsel is a matter of substance and not form. It is the solemn duty of the trial judge to make sure that representation of an accused by counsel is not an empty gesture but is the fulfillment of the spirit and purpose of the constitutional mandate.

FEDERAL CONSTITUTION, SIXTH AMENDMENT.⁴

Glasser v. United States, supra;

Von Moltke v. Gillies (1948), 332 U. S. 708, 68 S. Ct. 316;

Johnson v. Zerbst (1938), 304 U. S. 458, 58 S. Ct. 1019;

Thomas v. Hunter (C. A. 10, 1946), 153 F. 2d 834;

Jones v. Huff (C. A., D. C., 1945), 152 F. 2d 14.

Noncompliance with the constitutional mandate of assistance of counsel to one charged with a crime deprives the Court of jurisdiction to proceed.

Johnson v. Zerbst, supra;

Kuczymski v. United States (C. A. 7, 1945), 149 F. 2d 478.

The appellant did not have a trial, as that term is usually understood, because attorney Sweeney, who was forced upon appellant as his counsel, failed to do the ordinary things in appellant's defense which any competent attorney would have done as shown by *Assignment of Error 3, subdivisions a to l, inclusive, ante.*

Jones v. Huff (C. A., D. C., 1945), 152 F. 2d 14.

In the prosecution of a person for purchasing and selling narcotics the failure of the Government to call as a witness a person who was induced by a Government agent to attempt to purchase narcotics from accused

⁴"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

raised an inference against the Government on which the Court should have instructed the jury.

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645, approving

Morei v. United States (C. A. 6, 1942), 127 F. 2d 827.

If it be conceded that attorney Sweeney is a competent lawyer, the appellant did not have a fair trial as it appears from the record that Sweeney was protecting himself and not his client, which reduced to simple terms means that Sweeney did not give the appellant the defense to which due process under the Fourteenth Amendment to the Constitution accorded him. Furthermore, the instruction of the Court that the evidence of an accomplice should be received with caution did not fill the gap made in the defense of the appellant by the denial of the Court of a right to cross-examine the accomplices here, Browning and Winfrey and his wife, on an agreement for leniency and as to whether the accomplices believed that their testimony would be in their own best interest.

Cash v. Culver (1959), 79 S. Ct. 432.

In a prosecution for a conspiracy to violate the Federal Narcotics Act the declarations of a conspirator are not admissible against a defendant where the conspiracy, as here, was not established.

Ong Way Jong v. United States (C. A. 9, 1957), 245 F. 2d 392.

Guilt may not be established by mere association however close. It is true that the evidence as to Stein's association with Browning and the Winfreys and his prior record of a conviction for narcotics raises a suspicion of

guilt; but a suspicion, however strong, is not proof and will not serve in lieu of proof.

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121.

If there ever was a conspiracy here the testimony of the Government's witness Browning established that the conspiracy terminated in May, 1956. All evidence introduced by the Government of overt acts after termination of the conspiracy was inadmissible and seriously prejudiced the appellant's rights before the jury as to all counts in the indictment, as every alleged overt act of a sale was translated into substantive offenses in subsequent counts in the indictment.

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Lutwak v. United States (1953), 344 U. S. 604, 73 S. Ct. 481.

The evidence was insufficient to convict the appellant on Counts One, Three, Four, Five and Six.

Ong Way Jong v. United States (C. A. 9, 1957), 245 F. 2d 392;

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121;

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645;

Thomas v. Hunter (C. A. 10, 1946), 153 F. 2d 834;

Morei v. United States (C. A. 6, 1942), 127 F. 2d 827;

Glasser v. United States (1942), 315 U. S. 60, 62 S. Ct. 457;

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Cash v. Culver (1959), 79 S. Ct. 432.

VI.
ARGUMENT.

POINT I.

The Refusal of the Court to Grant Appellant Time to Secure Counsel to Defend Him at the Trial Denied the Appellant a Fair Trial Within the Meaning of the Sixth Amendment to the Federal Constitution. The Right of an Accused to Counsel Is a Matter of Substance and Not Form. It Is the Solemn Duty of the Trial Judge to Make Sure That Representation by Counsel of an Accused Is Not an Empty Gesture but Is a Fulfillment of a Constitutional Mandate. Noncompliance With the Constitutional Mandate of Assistance of Counsel at the Trial to One Charged With a Crime Deprives the Court of Jurisdiction to Proceed.

When the case was called for trial September 16, 1958, the only attorney designated of record for appellant by appearance praecipe was Harry E. Weiss, 448 South Hill Street, Los Angeles. This praecipe had been filed April 7, 1958. It was signed by appellant Fred Stein and by attorney Harry E. Weiss. [Tr. p. 15.] Mr. Sweeney had appeared on three or four occasions for appellant but it seems that these appearances were on behalf of Mr. Weiss. In this capacity at the opening of the trial, attorney Sweeney moved the Court for a continuance on three grounds, all of which from his statement appear quite vague. The first ground of the motion for a continuance was that attorney Sweeney did not know that the case was going to trial until Friday of the preceding week, four days before the commencement of the trial. Mr. Sweeney's lack of knowledge that the case was going to trial, so he said, was based upon some kind

of plea that was being negotiated, by whom it does not appear, that the appellant would make in the State Court where no charges were pending against appellant. Sweeney hinted that there were some negotiations going on between Federal and State narcotics officers for such a plea. The defense of a person in a criminal case does not travel on a plane so flimsy as negotiations for plea in another court where no charges have been made again him. The only reasonable conclusion to be drawn from the first ground of Mr. Sweeney's motion for a continuance was that he was engaged in some sort of manipulation with the State narcotics officers to help himself out on the narcotics and bribery charges which had been filed against him in the State Court two weeks prior to the opening of appellant's trial. It is not within the realm of common sense that Mr. Sweeney could make an adequate defense for the appellant in the Federal Court when he, Sweeney, was laboring under a charge of narcotics peddling and bribery in the State Court. Sweeney confessed his inability to make an effective defense for appellant because his defense of the appellant might react adversely to him, Sweeney, in his defense of the narcotics and bribery charges in the State Court.

The second ground of the motion amounted to nothing more or less than a vague reference to some kind of a deal relating to some testimony that appellant was supposed to have given in the case of *United States v. Michael Cohen* which did not involve a narcotics charge.

The third and real ground of the motion for continuance was that Sweeney wanted the continuance in order that the appellant might get additional counsel so that

any publicity which might result from the trial of appellant if he, Sweeney, appeared as his attorney would not react against Sweeney and the defense of himself on the narcotics and bribery charges which had just been brought against him two weeks before in the Superior Court of Los Angeles. [*Ante*, Specification of Error No. 1; Rep. Tr. pp. 4-8.]

While attorney Sweeney adverted to the adverse publicity he had received from his troubles in the State Court in his motion for continuance so that appellant could obtain other counsel, he did not elaborate. Samples of the publicity appear in the appendage of this brief.⁵

After the long discussion between the Court and counsel for the government and for appellant, which appears *ante* under Specifications of Error No. 1, the Court, in effect, compelled appellant to accept Sweeney as his counsel and to sign in Court a designation of Sweeney as his counsel and Sweeney signed the praecipe to that effect. [Rep. Tr. pp. 66-68.]

Attorney Harry Weiss was, as shown above, at the time case was called the attorney of record for appellant, designated as such in a designation signed by appellant and a praecipe signed by Mr. Weiss April 7, 1958. [Tr. p. 15.] There is nothing in this record to show that Mr. Weiss ever retired from his representation of the appellant

⁵While these two samples of the adverse publicity against Mr. Sweeney do not appear in the record, counsel feels justified in putting these samples in the appendix to this brief as Sweeney made the publicity a factual ground for his motion for a continuance. It is probable that if Sweeney had enlightened the Court by showing the Court samples of the publicity, the Court would have granted appellant's motion to continue the case so that appellant might get other counsel to defend him who would not have had the insurmountable burden of defending the appellant and himself on the related charges.

or that the appellant ever decided that he should retire. It could be that Mr. Weiss sent in Mr. Sweeney to appear in his place as attorney for the appellant. The Court said when he found that Mr. Weiss did not show up for the trial that this was not the first time that the Courts had had trouble with Mr. Weiss. The Court mentioned a case in which the defendant was convicted and then the defendant claimed that Mr. Weiss was never his attorney. Obviously, Sweeney was trying to protect Mr. Weiss and, at the same time, get shut of the case, himself. The Court, apparently becoming somewhat impatient with the situation, stated that Mr. Weiss had better come in to Court at once and directed the Marshal to go for Weiss, making the statement that, "I sort of have a feeling that Mr. Weiss is playing horse with the Courts." [Rep. Tr. pp. 67-68.]

The Sixth Amendment which guarantees the right of a defendant in a criminal case to counsel at all stages of a trial, is not satisfied by a lawyer, who accepts an employment and then "plays horse with the Courts"; or counsel in the position which Sweeney occupied, who cannot put on an adequate defense of a person charged with a crime for fear that whatever is brought out in the defense of the client may react unfavorably to the attorney in a criminal proceedings pending against the attorney in the local State Court on a similar charge to that which the client is charged in the Federal Court.

The constitutional right to counsel provided by the Sixth Amendment was not met by the vacillations of Sweeney and Weiss in this case. Obviously, Sweeney was trying to protect himself first, and Weiss second, with the appellant left in the unfortunate position of not knowing what to do or say. The Sixth Amendment was plainly violated when the Court denied appellant's motion

for a continuance to obtain other counsel and, in effect, compelled him to go ahead with his trial with Sweeney representing him. [Rep. Tr. pp. 66-68.]

The case of *Glasser, Kretske, Kaplan and Roth v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, seems to be directly in point here. In that case, Glasser, Kretske, Kaplan and Roth were indicted. The four persons mentioned were found guilty upon an indictment charging them with conspiracy to defraud the United States. (18 U. S. C., Sec. 88.) The Court of Appeals affirmed the convictions. (116 F. 2d 690.) Glasser, Kretske and Roth petitioned the Supreme Court for certiorari, which was granted. Glasser and Kretske had been assistant United States Attorneys until a short time before the indictment was returned.

William Stewart was employed by Glasser to represent him and entered his appearance as Glasser's attorney. The firm of Harrington and McDonald entered their appearance for Kretske. At the commencement of the trial, McDonald informed the Court that Kretske did not wish to be represented by him. The Court then asked Stewart if he could act as Kretske's attorney. Defendant Glasser, who was represented by Stewart, said he would like to have his own attorney represent him, alone. After a colloquy between counsel and the Court, the Court entered an order vacating the appointment of McDonald as attorney for Kretske, and appointed Stewart to represent him. Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial. At the conclusion of the trial, all of the defendants were convicted, and the Seventh Circuit affirmed. (116 F. 2d 690.) The Supreme Court granted certiorari.

Numerous grounds were urged in the Supreme Court for reversal. The Supreme Court affirmed the convic-

tion of Kretske and Roth but reversed Glasser's conviction. Glasser's conviction was reversed solely upon the ground of the appointment by the Court of his counsel, Stewart, to represent Kretske. It is impossible to distinguish the *Glasser* case from the case involved. In the case involved, Sweeney did not want to be forced to trial as appellant's attorney because he feared it would hinder the defense of himself in the similar charge which he was then facing in the State Court. The Supreme Court reversed the *Glasser* case because there was some conflict in the defense by Stewart of both Glasser and Kretske. On the face of things, it is clear that Sweeney was faced with a much more serious problem as he, himself, was involved personally. It is too much to expect of human nature that an attorney would do his best in a criminal case to defend his client, where a vigorous defense of the client would have the effect of embarrassing the attorney in the defense of himself on a similar charge. Reversing the conviction of Glasser. The Supreme Court said:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575; *Tumey v. Ohio*, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; *Patton v. United States*, 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see *McCandless v. United States*, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from em-

barrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretschke's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser." (315 U. S. pp. 75, 76; 62 S. Ct. pp. 467-468.)

At this point we again advert to the publicity mentioned by attorney Sweeney when he made the motion for continuance of the trial so that other counsel could be secured and relieve him from the burden of taking the chance by the trial of appellant's case of hurting his defense to the charges pending against him in the State Court, filed just two weeks before. Although the newspaper clippings attached are not a part of the record, we feel justified, under the circumstances, in attaching them as an appendix to this brief. Once attorney Sweeney had mentioned the

publicity, it was his duty as an officer of the Court to inform the Judge of the particulars of the charges against him in the State Court; and, too, it possibly was the Judge's duty to continue the case at least long enough for the Judge to find out, from the actual facts, what was on attorney Sweeney's mind, and thus clarify the vague and indefinite statements he made to the Court.

In *Johnson v. Zerbst* (1938), 304 U. S. 458, 58 S. Ct. 1019, and *Von Moltke v. Gillies* (1948), 332 U. S. 708, 68 S. Ct. 316, both habeas corpus proceedings, the Supreme Court held that the lack of the assistance of counsel at a trial in a criminal case deprived the Court of jurisdiction to proceed. All the cases hold that a defendant is entitled to counsel of his own choosing. Appellant did not choose Sweeney to try this case for him and tried as best he knew how to get rid of him. But he was unable to do so and was forced to accept him and proceed with the trial, resulting in the unfortunate circumstances in this brief detailed of a 50 year sentence meted out to a man of 51 years on which he is not entitled to parole.

It was said in *Johnson v. Zerbst*:

“There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’ A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.” (304 U. S. pp. 464-465, 58 S. Ct. 1023.)

Sweeney confessed that he had done nothing to prepare for appellant's trial. He had busied himself with his own troubles during the two weeks immediately preceding the trial and had engaged in some form of manipulations to have appellant make a plea in the State Court where he had not been charged with anything. This was an indulgence in frivolity by attorney Sweeney and the Court would have been justified if it had made inquiry into the subject, in finding that Sweeney was talking with the State authorities in his own behalf, with no thought of his client's welfare.

It was said in *Von Moltke v. Gillies*, *supra*:

“Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope,

and that is particularly true of conspiracies under the Espionage Act. See e.g., *Gorin v. United States*, 312 U. S. 19, 61 S. Ct. 429, 85 L. Ed. 488; *United States v. Heine*, 2 Cir., 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. * * *

"It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson v. Zerbst*, 304 U. S. 458, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461, 146 A. L. R. 357; *Hawk v. Olson*, 326 U. S. 271, 278, 66 S. Ct. 116, 120, 90 L. Ed. 61. This duty cannot be discharged as though it were a mere procedural formality. * * *

"The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (332 U. S. pp. 322, 323, 324, 68 S. Ct. pp. 722, 723.)

POINT II.

Appellant's Motion for a New Trial Should Have Been Granted; or at Least Appellant Should Have Been Given the 5 Days Allowed in Rule 33, Federal Rules of Criminal Procedure to Make His Motion for New Trial.

Counsel are aware of the rule that the granting or denying of a motion for new trial is a matter within the sound discretion of the trial court. (*Gage v. United States* (C. A. 9, 1948), 167 F. 2d 122, 125.) The denial of the motion for new trial in this case stands on a different footing. The motion for new trial was largely in the statutory form. (*F. R. Cr. P.*, 18 U. S. C., Form 23, p. 623.) Paragraph 9 of the motion [Tr. p. 68] differs from the statutory form and is as follows:

“The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, defendant was not granted a reasonable continuance in order for him to secure additional counsel.”

It is evident from that statement in the motion for a new trial that Mr. Sweeney was desirous of avoiding the dilemma in which he found himself at the trial of trying to represent the appellant and at the same time be careful not to trample on his own feet in the State narcotics and bribery cases pending against him. It seems that this was the last opportunity Mr. Sweeney had to raise the vital point, that he had been unwillingly pushed into the trial of the case when he knew that he could not represent the appellant effectively without infringing upon the defenses which he, Sweeney, had to make in the narcotics and bribery charges pending against him in the Superior Court for the County of Los Angeles. At this point, if the Court

had given appellant the 5 days fixed by Rule 33 to make his motion for a new trial, enough time would have been allowed for appellant to obtain other counsel, unfettered by personal considerations, who probably could and would have brought this case on the motion for new trial within the rule of *Glasser v. United States, supra*; *Johnson v. Zerbst, supra*; *Von Moltke v. Gillies, supra*; and *Cash v. Culver* (1959), 79 S. Ct. 432.

The appellant was entitled as a matter of law, under Rule 33, to such consideration and should have been allowed to obtain other counsel to present the facts of the incompetent manner in which Mr. Sweeney handled the trial, not due to Mr. Sweeney's lack of ability, but to the ghost of Sweeney's own trial lurking in his subconscious mind and constantly signaling to Sweeney to be careful of what he did in defense of appellant, as any move he might make for appellant would embarrass him at his own trial.

The appellant was thus denied a fair hearing on his Motion for new trial, in violation of Rule 33. In the circumstances, appellant was not given due process of law within the meaning of the 5th Amendment or allowed assistance of counsel for his defense as guaranteed to him by the 6th Amendment. (*Jones v. Huff, supra*; *Glasser v. United States, supra*; *Johnson v. Zerbst, supra*; *Von Moltke v. Gillies, supra*.)

The rights guaranteed by the 5th and 6th Amendments cannot be served by applying them to suit the personal convenience of a judge. The Court refused to hear the motion unless it was filed immediately and argued the next day after the verdict, September 23, 1958, which was a Tuesday. [Rep. Tr. pp. 639-640.] The record indicates that the Judge was leaving on his vacation the afternoon

of the 23rd of September and would be gone for an indefinite period. [Rep. Tr. pp. 639-640.] The fact that the Judge was going on his vacation the afternoon of September 23, 1958, could have exercised an unconscious influence upon the Judge, moving him to deny a continuance of the trial on September 16, 1958, knowing that he would be leaving on September 23, 1958, and that the trial would take up most of the intervening time. A defendant in a criminal case may not be deprived of any right to suit the convenience of a Judge. While the convenience of the Court may be important, the convenience of a judge of the court is of no consequence. The Court should have allowed appellant the 5 days provided in Rule 33. Failure to do so requires a reversal of the order denying appellant's motion for new trial.

POINT III.

Attorney Sweeney's Defense of the Appellant in the Trial Was Inadequate and Incompetent, so Much so That the Appellant Did Not Have a Trial Within the Meaning of the Sixth and Eighth Amendments to the Constitution.

Attorney Sweeney's weak, inadequate and incompetent defense of appellant at the trial could have been avoided at the outset if Sweeney had strongly impressed upon the Court at the commencement of the trial his inability, for personal reasons, to defend the case properly. The opportunity arose again upon the motion for new trial but Sweeney failed to demand the 5 days appellant was entitled to under Rule 33 to make his motion. Instead of taking a firm position at the commencement of the trial, and upon the motion for new trial, Sweeney weakly acceded to his being pushed into the trial of the case and to making the motion for new trial prior to the 5 days

time he was allowed by Rule 33. Sweeney's failure to insist upon a continuance at the beginning of the trial and his failure to insist upon the right of the appellant to have 5 days within which to make the motion for new trial have been fully covered in Points 1 and 2 above. We advert to these failures now for the purpose of pointing out the particulars in which Sweeney failed to give the appellant any more than a token defense, which failures we have set up in detail in *Assignment of Errors* No. 3, *ante*.

Appellant was convicted solely upon the testimony of three government witnesses, Quentin Browning, Clarence Winfrey and Celeste Winfrey, described in the indictment as "unindicted co-conspirators," and four officers, William C. Gilkey, James H. Mulgannon and Lawrence Katz, Federal Narcotics Agents, and William R. Farrington, who is a deputy sheriff in Los Angeles County, assigned to the narcotics division. Attorney Sweeney did not, at the conclusion of the testimony of any of these witnesses, demand the production of statements and reports which the witnesses had made in the case, as he should have done. (18 U. S. C., Sec. 3500.)

The production of the statements and reports of those witnesses, made prior to the trial, was the only sure way to develop, on cross examination of the Government's witnesses, the manipulations of the officers and the promises of the officers to Browning and to the two Winfreys of immunity from prosecution and all other important things to the defense in their testimony. The statements and reports would have been of the greatest value in the defense of the appellant, as he was convicted solely upon the testimony of the accomplices. Nothing could have occurred, which could have demonstrated more clearly Sweeney's incompetence, than the failure to demand the statements. It

cannot be supposed that Sweeney was ignorant of Section 3500 or the case of *Jencks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007. Section 3500 is known by its popular name as the Jencks law. The section became effective in September, 1957, and was based on the *Jencks* decision. Due to the wide publicity following the *Jencks* decision and the adoption of Section 3500, a lawyer practicing criminal law, as Sweeney was, who did not know about the section and its several intendments would, in itself, be enough to demonstrate his incompetence to try a criminal case in the Federal Courts. There is no answer to Sweeney's failure to take advantage of this vital element in the defense of appellant other than the fact that the record indicates that he, himself, was involved in the narcotics racket and that he did not dare to ask for the reports, as the manipulations prior to the trial, in which he confessed he had indulged, would probably have exposed him as as a member of the racket.

Under *Jencks v. United States, supra*, if Mr. Sweeney had demanded the reports and they had been refused, there was nothing the Government could have done but dismiss the indictment.

In order that we may keep this brief within the limits provided by Rule 18(e) we think it sufficient to refer to the other harmful omissions of Sweeney at the trial by inviting the Court's attention *ante* to *Assignment of Errors* 3(b)—(1) where these vital omissions of Sweeney are set forth with particularity and with the transcript references.

The relationship between client and attorney is of the most sensitive character. The statutes and rules of professional conduct put this relationship on a level higher than that trodden by the crowd in a workaday world. The

mere fact that an attorney is charged in a formal criminal complaint with narcotics peddling and bribery in connection with such peddling should disqualify him while he is laboring under those charges from appearing in any Court, and especially, in defense of a narcotics case in which he confesses to the Court that he himself might be incidentally involved. A defendant charged with the sale and distribution of narcotics would be, by public acclaim, convicted before his trial started, if the jury suspected that the attorney representing defendant had been himself charged in a formal complaint with being a narcotics peddler.

The recent decision of *Cash v. Culver* (Feb. 24, 1959), 79 S. Ct. 432, seems to us to be directly in point. The facts in *Cash v. Culver* are analogous to those of appellant's case. The *Cash* case came up from Florida on a petition for *habeas corpus*. The case holds that the 14th Amendment requires that the accused must have legal assistance at a trial in a state court. The defendant, Cash, was charged and convicted of burglary in Florida. He was sentenced to 15 years in the penitentiary. His accomplice, Allen, who testified for the State got 10 years and probation. Defendant Cash had counsel but his counsel withdrew from the case just prior to trial. Cash asked for a continuance to obtain counsel, or that the court appoint counsel to defend him; the Court denied the motion. The case went to trial with Cash appearing for himself.

In spite of Florida law, which provides counsel for defendant only in a capital case, the Supreme Court reversed the decision of the Florida Supreme Court which had affirmed the order of the lower court denying Cash's petition for *habeas corpus*. The Supreme Court said:

"In the 17 years that have passed since its decision in *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86

L. Ed. 1595, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment. The alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.” (79 S. C. pp. 435-436.)

The *Cash* case is also controlling authority on the point that Attorney Sweeney was derelict in his duty in not demanding the statement or reports of the Government witnesses who testified at the trial (18 U. S. C., Sec. 3500) as the reports or statements were the best foundation for cross-examination of the accomplices, Browning, and the two Winfreys, on whether or not they were “testifying under an agreement for leniency” and whether or not they believed that their testimony would be in their “best interest.” (79 S. Ct. p. 436.)

Counsel for appellant respectfully assert that if they are right as they think they are, that appellant has been denied a fair trial because he had to go through his trial with Attorney Sweeney as his lawyer, then the conviction on all counts of the indictment should be reversed. However, the gravity of the charges in the indictment and the severity of the sentence constrains counsel to attack the conviction on the following additional grounds which they believe to be meritorious.

POINT IV.

The Evidence Is Insufficient to Justify the Verdict on Any One of the Five Counts in the Indictment, Counts One, Three, Four, Five or Six, Upon Which Appellant Was Convicted.

Count One charges a conspiracy between appellant and three “unindicted co-conspirators,” Quentin Browning, Clarence Winfrey and Celeste Winfrey. Seventeen overt acts are alleged in the indictment. The indictment charges that the conspiracy was formed on or about January 1, 1956 and lasted until July 11, 1957. The indictment alleges the date of the first overt act as January 21, 1956; and, the seventeenth and last one, as July 11, 1957. [Tr. pp. 1-3.]

We believe that the Court correctly stated the rule when overruling an objection of appellant’s counsel Sweeney to a question by the District Attorney of what Winfrey said to Browning concerning his interest in the “stuff” if the quality of the “stuff” was what it was supposed to be. The grounds of Mr. Sweeney’s objection were that no foundation had been laid and that the conversation was not in the presence of the defendant. The Court overruled the objection, stating:

“And the conversations out of the presence of one of the other conspirators are admissible if there is sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed.” [Rep. Tr. p. 87.]

It is appellant’s position that the record is barren of “sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed.” The only testimony on the subject of the formation of a conspiracy was that of accomplice Browning. There is nothing in

the testimony of the Winfreys, separately or together, sufficient to establish or tend to establish a preliminary agreement for a conspiracy or that if one had been formed that the Winfreys joined it.

Browning testified over the objection of appellant to the conclusion that: "We were partners. We were to be partners." [Rep. Tr. pp. 71-77.] Browning testified that the alleged agreement or partnership was formed in Los Angeles. At their first meeting, there was no discussion of narcotics. [Rep. Tr. p. 71.] Appellant denied that there was any agreement or partnership of any sort between him and Browning. [Rep. Tr. p. 442.] Appellant denied that when he went to New York that he went there pursuant to an agreement between him and Browning to purchase narcotics, or that he went there for the purpose of purchasing narcotics. [Rep. Tr. pp. 455-456.] Appellant testified that he went to New York with Evelyn Babbins, the woman he afterwards married, and her daughter, arriving September 6, 1956. Appellant then remained in New York while Evelyn Babbins and her daughter went on to Buffalo to visit her father, who was ill. [Rep. Tr. p. 434.] Appellant's testimony was corroborated by Evelyn Babbins. [Rep. Tr. pp. 368, 369.]

The only testimony in the record that there was a partnership or agreement of any kind between Browning and appellant is that mentioned above where Browning testified over the objection of appellant to the conclusion that he and appellant had a partnership or agreement. [Rep. Tr. pp. 71-77.] Browning testified that the so-called partnership was terminated May, 1956, and was not continued in any way thereafter. [Rep. Tr. pp. 114-115; 123-124.] It is alleged in Overt Act No. 1 [Tr. p. 2]: "That on or about January 21, 1956, defendant Fred Stein delivered three ounces of heroin to Quentin Browning."

It is charged in Count Two of the Indictment [Tr. p. 4] that on or about January 21, 1956, appellant sold and facilitated the sale of approximately two ounces of heroin to Quentin Browning. It follows that Overt Act No. 1 is translated into the substantive offense charged in Count Two. Count Two was dismissed.

Appellant is charged in Count Three with having facilitated the sale, on January 21, 1956, to Clarence Winfrey and Celeste Winfrey of the same heroin he is charged with having sold and facilitated the sale of to Quentin Browning in Count Two. This is also the same heroin which is mentioned in the conspiracy count, Overt Act, No. 1. [Tr. pp. 1-4.] It does not appear at the time laid in Overt Act, No. 1, and in Count Two, that appellant had any contact whatever with Clarence Winfrey or Celeste Winfrey, his wife. The evidence relating to the conspiracy count and Overt Acts Nos. 1 to 7, inclusive, raise a mere suspicion of guilt by association, which cannot be accepted in lieu of proof. (*Ong Way Jong v. United States* (C. A. 9, 1957), 245 F. 2d 392; *Evans v. United States* (C. A. 9, 1958), 257 F. 2d 121; *Robinson v. United States* (C. A. 9, 1959), 262 F. 2d 645; *Thomas v. Hunter* (C. A. 10, 1946), 153 F. 2d 834; *Morei v. United States* (C. A. 6, 1942), 127 F. 2d 827.) Those cases following the rule recently laid down by the Supreme Court. (*Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457; *Krulewitch v. United States* (1949), 336 U. S. 440, 69 S. Ct. 716; *Cash v. Culver* (1959), 79 S. Ct. 432.)

The testimony of Browning that the so-called partnership between him and appellant was terminated in May, 1956, eliminates Overt Acts, Nos. 8 to 17, inclusive. [Rep. Tr. pp. 114-115; 123-124.] We feel that the

Government will be unable to take advantage of Attorney Sweeney's failure to object to this testimony on the ground that the conspiracy, if one ever existed, had terminated. (*Ante*, HEADING VI, ARGUMENT, POINTS I TO III, INCLUSIVE.) We feel that the above is sufficient to dispose of both the conspiracy count and Count Three, as we have already shown that the testimony creates nothing more than a suspicion, which is not acceptable in lieu of proof.

Counsel for appellant feel that the conviction on Counts One and Three must fall for another reason. There is not one word of testimony in the record relating to Counts One and Three or to any of the other four counts alleged in the indictment, including Count Two, which was dismissed, that heroin or any other narcotic substance was involved in any of the overt acts alleged in Count One or the substantive offenses alleged in Counts Two, Three, Four, Five and Six. It is true that the packages which the accomplices Browning and the two Winfreys said were involved in the six counts charged in the indictment were said by the accomplices to contain "stuff" or "merchandise"; the word heroin or narcotic is not mentioned in their testimony. It was assumed by the Government and by the jury that the packages involved contained heroin and that the charges in the indictment that they contained heroin followed, although there is not one word of testimony in the record that any of these packages was ever examined by a chemist to determine the contents nor does anyone know from this record what the packages contained, as none of them was produced by the Government at the trial and the contents of none of the packages was analyzed by a chemist.

The faults outlined above as to Counts One and Three reappear in Counts Four, Five and Six.

Count Four.

Count Four is a translation into a substantive offense of Overt Acts 3, 4 and 6. We have already shown above how there was no proof of a conspiracy between appellant and Quentin Browning because no evidence was introduced of the conspiracy except the conclusion of Browning, admitted over the objection of appellant, that he and appellant were partners. There is not a word of testimony in the record that there was any agreement of any sort between appellant and the Winfreys. Thus, the conspiracy count and its relationship to Count Four are ended.

Count Four charges as a substantive offense, that appellant, on or about February 15, 1956, sold and facilitated the sale of three ounces of heroin to Clarence Winfrey and Celeste Winfrey. The only testimony of this sale was that of the two Winfreys. The testimony of Clarence Winfrey on Count Four was that he telephoned appellant and asked for some "stuff" or "merchandise." Later during the night of that same day, Winfrey got a telephone call which, as far as he could remember, was appellant's voice, and of which he said that appellant told him to meet him at the same place. Winfrey and his wife met appellant at Bronson and Washington Streets in Los Angeles. The Winfreys testified that appellant handed to Celeste Winfrey, who was in the car with her husband, a cellophane bag which contained the "merchandise." [Rep. Tr. pp. 208-212.] Appellant categorically denied the whole incident. [Rep. Tr. p. 448.] All of the testimony of the two accomplices does not rise above the level of a suspicion, as the Government offered no proof of what the "merchandise" consisted. If a conviction could be had on such testimony, no one is safe from the manipulations of the police, who could put the finger on anyone

by merely promising immunity to a person who has been arrested for narcotic violations if he will name the source of his supply.

Count Five.

Count Five charges the sale and facilitation of the sale in Los Angeles County on September 10, 1956, of five ounces of heroin by appellant, to Quentin Browning. Here, too, as in Counts Three and Four, there was no proof that the alleged substance was a narcotic. The appellant was convicted on Count Five solely upon the testimony of Browning. Browning testified [Rep. Tr. p. 124] as follows:

“I saw Fred Stein during September, 1956, the early part; I came down and purchased five ‘pieces’ of ‘stuff’ from him, for which I gave him \$3,000.00, and I took the heroin and took it back to San Francisco and sold it.”

This testimony did not fix the date as September 10 or any other definite date and in this connection, it is to be recalled that defendant Stein produced an alibi which was uncontradicted on the part of the Government that from September 6 to September 19, appellant was in New York.

Count Six charges that appellant, on March 3, 1957, in Los Angeles County, sold and facilitated the sale of three ounces of heroin to Clarence Winfrey and Celeste Winrey. This sale, too, was based solely on the testimony of Clarence Winfrey and Celeste Winfrey that they purchased three ounces of “merchandise” from appellant about the time laid in Count Six. There is not a word of testimony in the record as to what the “merchandise” consisted and, as we have said before, appellant denied categorically that he had ever sold or facilitated the sale of narcotics

to Browning, Clarence Winfrey or Celeste Winfrey, or to any of them. We restate here as we have so many times throughout this brief that the Government did not produce at the trial a single particle of heroin or other narcotic substance as having ever been in the possession of appellant or as having ever been sold by him to Browning or the Winfreys, or either of them. The Winfreys or Browning did not testify that the alleged "merchandise" which they received from appellant was heroin or any other narcotic substance. The Government did not ask them to say what it was. Neither of them was a chemist or an expert witness and could not have known whether or not the package contained a narcotic. The point is strengthened by the erroneous admission of evidence over the objection of the appellant, as set forth in Assignment of Errors 4, 5, 6, 7, 8, 9, 10 and 11, *ante*. There the objections are fully set forth in accord with Rule 18, with full transcript references. It appears to us that it would be repetitious to repeat them here, but counsel respectfully assert that the errors admitting this evidence were highly prejudicial to the appellant and that no one could say that the result would not have been different upon all counts that he was convicted if the Court had sustained his objection. Appellant respectfully contends that his convictions on each of Counts One, Three, Four, Five and Six should be reversed.

Respectfully submitted,

WM. H. NEBLETT, and
E. W. MILLER,

Counsel for Appellant.







APPENDIX.

(Los Angeles Times, Sat., Aug. 30, 1958)

ATTORNEY HELD ON DOPE CASE BRIBERY CHARGE

Paul Wesley Sweeney, 31, attorney for Cecil (Hard-rock) Thomas, a dope addict and peddler who was shot to death last Oct. 28, the night before he was to testify for the government in a narcotics case, was booked in the County Jail yesterday on suspicion of bribing a public official and violation of the State Narcotic Act.

Sheriff's narcotics officers arrested Sweeney in front of the Federal Building as he assertedly handed Sgt. Robert Nichols five \$100 bills. Sgt. Nichols said he had been offered the \$500 by Sweeney after nurses at General Hospital called the Sheriff's office when they suspected a woman friend of the lawyer was being passed narcotics from the outside.

The friend, Miss Willie Williams, 29, of 3920 S. Main St., said by Nichols to be a known narcotics addict, was in General Hospital for the withdrawal treatment.

Sgt. Nichols staked out the hospital Thursday and reportedly witnessed Sweeney pass a red balloon to Miss Williams. Nichols said that the woman immediately swallowed the contents except for one pill Sweeney was not arrested at the time because of the unknown contents.

Nichols said Sweeney later contacted him stating, "Listen, if you can make that pill into something else, there's \$500 in it for you."

Officers said Sweeney, who gave his address as 2724 Palm Grove Ave., denied the narcotic charge but admitted passing the \$500 to Sgt. Nichols. "It was a stupid thing to do," he said.

(Los Angeles Tribune, Friday, Sept. 5, 1958)

ATTY. PAUL SWEENEY SAYS SHERIFF'S OFFICE FRAMED HIM

Reputedly brilliant Los Angeles lawyer Paul W. Sweeney was arraigned yesterday in Division 4 of the Municipal Court on one count of bribery and two of narcotics violation, following an arrest which shocked the community last Friday afternoon.

Denying both charges vehemently, Sweeney, for Industrial Relations secretary of the Los Angeles Urban League, claims he was "framed" by the sheriff's officers who say he attempted to bribe them with \$500 after they caught him in the narcotics violation.

In a hasty interview with a Tribune reporter in the Hall of Justice corridor, Sweeney issued a simple denial to the charge that he passed a "red balloon," presumably heroin and some Amidone pills a narcotic, to Miss Willie B. Williams, in the Los Angeles County hospital on the preceding day.

Sweeney also denied the reports that he has been going with Miss Williams, and that she is pregnant by him and has another child by him, and that police had warned him several times previously about supplying her with drugs.

Sweeney is married and the father of two children. He lives with his wife at 2724 Palm Grove. He told the Tribune with reference to Miss Williams, "She is a client, that's all. Everybody knows that."

NOTHING TO DO WITH DOPE UNDERWORLD

Sweeney, who was the lawyer for Cecil "Hardrock" Thomas, narcotics informer, who was shot and killed the night before he was slated to change his testimony and involve Los Angeles Narcotics officers in the dope trade, was asked if his arrest and the alleged "framing" had anything to do with the "Hardrock" Thomas case which the Los Angeles Federal Grand Jury has been inquiring into since January, apparently without coming to any conclusion.

He answered: "Oh, nothing like that.

"This is another situation." He refused to elaborate because he said he did not want to 'tip' the police off.

He said that Miss Williams' "mother called me and told me to go to see her."

"I've defended her in a theft case and a narcotics case," he added.

According to the sheriff's officers they have been "watching" Sweeney some time as he was suspected of smuggling dope to the woman.

On Thursday, Aug. 28, they claim they saw him pass drugs to her in the hospital, and he was placed under arrest.

The officers claim that Miss Williams swallowed the red "balloon," and they got the pills. They released him after questioning, pending outcome of the laboratory tests on the pills.

Sheriff's deputy R. D. Nichols claims that on Friday Sweeney called him and arranged to meet him at a cafe frequented by lawyers in the vicinity of the Hall of Justice, called the Brush and Quill.

When they shook hands, the officer said, Sweeney passed \$500 to him, and was immediately taken into custody on the bribery charge.

Other officers in on the arrest were: L. Peterson, M. Renteria, and W. Farrington, all of the Sheriff's Narcotics squad.

Sweeney denied this in detail.

He said he did not call the Narcotics officers; they called him, he said.

"They arrested me and held me without booking me for hours."

He also claimed that after the "incident happened at the hospital, I went home and called the Chief of Federal Narcotics and told them the story."

This action he said, shows "I wasn't trying to bribe anyone."

While Sweeney was being arraigned, a superior court judge had to recess a murder trial in which he was the defense attorney.

He was released under \$2500 bail, posted by Celeste King, and his case set for preliminary hearing Sept. 25 at 9:30 a.m. in Division 4 before Judge Louis Kaufman.

He is defended by Max Solomon, described as a brilliant criminal lawyer, and he told the Tribune, "I am confident the truth will come out, and I will win the case."

Miss Williams, who is described as an attractive brown-skin woman, was released from the hospital on a surety bond after being filed on for one count of possession of narcotics. Her preliminary has been set for Sept. 18 at 1:45 p.m. and she is being represented by Atty. John Marshall, who was one of the defense attorneys for Wallen

Juan Appleby, who was sent to San Quentin for the bathtub murders of Mr. and Mrs. Walter L. Gordon, Sr., parents of criminal lawyer Walter L. Gordon, Jr.

Courtroom attaches said Miss Williams has been in and out of the County hospital, voluntarily trying to “kick” her narcotics “habit” for the past two years.

Sweeney is a graduate of Howard university law school and worked for the Urban League several years before going into private practice.

No. 16309.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILE

MAY 19 1959

PAUL P. O'BRIEN,

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No. 16309.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by a jury on September 22, 1958, in a trial before the United States District Court for the Southern District of California, the Honorable Pierson Hall presiding, which adjudged the defendant guilty on each of Counts One, Three, Four, Five and Six of an Indictment returned by the Grand Jury for the Southern District of California. This Indictment was brought under the provisions of Section 174 of Title 21, United States Code on March 5, 1958.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain the appeal and to review the proceedings leading to said judgment

by reason of Sections 1291 and 1294 of Title 28, United States Code.

On September 23, 1958, the defendant was sentenced to the custody of the Attorney General for a term of years. Appellant filed his notice of appeal on September 26, 1958.

II.

STATUTE INVOLVED.

This Indictment was brought only under Section 174 of Title 21, U. S. C. The first page of the Indictment contains the erroneous mention of Section 371 of Title 18, U. S. C., which is the general conspiracy statute. However, Section 174 of Title 21, U. S. C., is the controlling section under which Count One was filed. A discussion of the applicable statute as to Count One was had during the instruction conference [Rep. Tr. 511, 512] and the Court stated that, in effect, the substantive offenses and the conspiracy were all contained in Section 174.

It is to be noted that the sentence of 20 years imposed upon the conspiracy conviction on Count One runs concurrently with the 20-year sentence imposed upon Count Three, a substantive offense.

III.

STATEMENT OF THE CASE.

The indictment in six counts was filed on March 5, 1958. [Clk. Tr. 6.] The case was placed on the calendar of Judge William M. Byrne at Los Angeles on March 10, 1958, when appellant was arraigned. Attorney Paul Sweeney appeared with him and moved for reduction of bail. The cause was then continued to March 24, 1958, for plea. [Clk. Tr. 10; Rep. Tr. 60.]

On March 24, 1958, the case was called for plea and Attorney Arthur Sherman appeared as counsel. It was continued to April 7, 1958, for plea. [Clk. Tr. 13.] A motion by the defendant for reduction of bail was heard on April 3, 1958, Paul Sweeney appearing for appellant. [Clk. Tr. 14.] At that time the bond was reduced to \$10,000. An appearance praecipe showing Harry E. Weiss as the attorney in the case, was filed on April 7, 1958. [Clk. Tr. 15; Rep. Tr. 60.]

On April 7, 1958, the cause was continued to April 21, 1958, for plea and for the hearing of motions. Harry Weiss appeared as counsel. On April 15, 1958, a motion for Bill of Particulars was filed by Arthur Sherman and an opposition thereto filed by the government on April 24, 1958.

On April 28, 1958, Paul Sweeney again appeared as counsel on the hearing of appellant's motion for a Bill of Particulars. At that time a plea of not guilty to all six counts of the indictment was entered and the cause set for trial June 17, 1958. [Clk. Tr. 33; Rep. Tr. 61.] On June 17, 1958, Paul Sweeney appeared and, in the defendant's presence, requested a continuance. The cause was then set for jury trial on August 12, 1958. [Clk. Tr. 34.]

On August 12, 1958, Paul Sweeney appeared again and secured another continuance of the trial date to September 16, 1958. [Rep. Tr. 63.] The defendant knew on August 12, 1958, that the case was set for trial for September 16, 1958. [Rep. Tr. 64.]

From June 17, 1958, up until September 16, 1958, Paul Sweeney was the attorney for the defendant. Harry Weiss had "stepped out" as the attorney as of June 17,

1958. From that time Mr. Weiss was no longer representing the defendant. These statements were made to Judge Hall by appellant and by Paul Sweeney when appellant made his motion for still another continuance of the trial date on September 16, 1958. [Rep. Tr. 62.]

It appears from the above that there were two continuances and the request on September 16 was for a third continuance and a fourth trial date. [Clk. Tr. 33, 34.]

On September 16, 1958, when the case was called for trial and the jury panel in the courtroom, the defendant made his motion for continuance with no advance warning. [Rep. Tr. 4, 63.] Among other claims which appellant made as a basis for his motion to continue the trial, Mr. Sweeney alleged that he was "just aware of the fact that we were going to trial Friday of last week." He then suggested that some kind of negotiations had been in progress involving a plea in the State court by appellant in lieu of trying the matter in the Federal court. He was "totally unprepared to go to trial in this matter, thinking that this might be worked out in the State court and so we did not prepare our defense."

In this connection, it is of interest to note that Judge Hall also had before him the statement of government counsel with respect to the alleged negotiations for the disposition of the case. The explanation of government counsel was not included in the extensive quotation set forth in appellant's opening brief. It is as follows:

"Mrs. Bulgrin: I would like to state for the record—I don't want to belabor the problem—but at no time except in one instance has the government, at least as far as I know, indicated to Mr. Sweeney or his client that the case would not be prosecuted. In our view it was a serious matter.

However, there were a rash of different proposals for the disposition of the matter against Mr. Stein. We afforded Mr. Sweeney the courtesy of considering them, as we would anyone, and they were turned down completely and, as far as I know, Mr. Sweeney was under the impression last week and quite some time before that we would go to trial.

The Court: I do not think there is sufficient grounds for a continuance. We will proceed to trial.”
[Rep. Tr. 8.]

With respect to Sweeney’s claim that he was totally unprepared to go to trial, it is also important to note that he had previously stated to Judge Hall, in connection with an alleged variance between the facts set forth in the trial memorandum and the facts set forth in the indictment:

“* * * and when we were before Judge Clarke we did prepare defenses toward those overt acts, * * *.”
[Rep. Tr. 6.]

The record shows that the case was before Judge Clarke on April 3, 1958, April 7, 1958, April 28, 1958, and June 17, 1958. [Clk. Tr. 14, 16, 33, 34.] The defenses which Sweeney stated that he had prepared toward the overt acts in count one of the indictment would necessarily have applied to substantive counts two through and including six. [Clk. Tr. 1-6.]

During further colloquy between court and appellant, the following facts were brought out:

“The Court: Have you told Mr. Sweeney all the facts in this case?

The Defendant: Yes, sir.

The Court: He has advised you of the law and as to your rights?

The Defendant: Yes.” [Rep. Tr. 64.]

The above was also omitted from appellant's extensive quotation in his opening brief.

Of further interest is a statement made by Attorney Sweeney to the court as follows:

“* * * I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue * * *.” [Rep. Tr. 67.]

Mr. Sweeney then stated that his own situation “just made me wonder” whether he should try the case. The court stated to him: “It is up to the defendant to make up his mind.”

Although the application for a fourth trial date was not made until the very day of trial on September 16, 1958, and was made with no advance notice to the court, it is apparent from the proceedings that Mr. Sweeney and the appellant had discussed that trial date previously. [Rep. Tr. 64.] Mr. Sweeney also stated that his arrest on a “bribery” incident had occurred at least two weeks before September 16, 1958.

“Mr. Sweeney: It occurred two weeks ago.

The Court: It occurred long enough ago that some change in counsel should have been made by this time.” [Rep. Tr. 8.]

As indicated above, an appearance praecipe was filed by Harry Weiss on April 7. However, although a substitution of attorney was not filed, it appears clearly from the record that Paul Sweeney was the only attorney for appellant from June 17 to September 16, 1958. The defendant admitted that this was true. [Rep. Tr. 62.] An attempt was made to drag Mr. Weiss into the proceedings, even though appellant admitted Weiss had stepped out before

June 17, 1958. We might say at this point that this was apparently done because Weiss was not present in court with the opportunity of responding and he had, according to Judge Hall, played "horse" with the court once before. [Rep. Tr. 67, 68.] However, when it was apparent that the court was calling appellant's bluff and indicated Mr. Weiss should come into the courtroom for a statement [Rep. Tr. 66, 67], appellant admitted once more that Mr. Sweeney was his lawyer. [Rep. Tr. 68.]

When the court stated, "It is up to the defendant to make up his mind" [Rep. Tr. 67], it was the second time Judge Hall had made that statement to appellant. Previously he had said, after listening to what might be best described as "double talk" as to who was representing appellant:

"The Court: Mr. Sweeney is your lawyer?"

The Defendant: Yes.

The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. I will declare a few moments recess, before you put any witness on the stand.

Mrs. Bulgrin: Yes, your Honor.

The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.

Mr. Sweeney: All right, sir." [Rep. Tr. 65, 66.]

After appellant advised the court that he wished Mr. Sweeney to be substituted in place of Harry Weiss, Sweeney stated, "I think by tomorrow we are going to have another counsel that I will associate in the matter." [Rep. Tr. 68.] However, the record shows that no other counsel was associated in the case and Mr. Sweeney under-

took to represent the defendant as the only attorney in the case during the trial.

The court denied the motion for the continuance and a jury was selected. Although the court did not expressly ask the jurors whether or not they had ever heard of Mr. Sweeney, there is no indication that any of the jurors had had anything to do with him. [Rep Tr. 18, 19.] Further, the court asked the jurors this question:

“Suppose you were charged with a crime, or some one near and dear to you, such as this defendant is here today, would you be willing to risk your rights and liberties, or that of the one near and dear to you, at the hands of a jury of twelve men and women if each one of them felt toward you or them as you now feel toward this defendant? Would you be willing to do so?”

The reporter's notes indicate that the response to this question was “(Assent).” [Rep. Tr. 23.]

The government called as witnesses on its case in chief Quentin Victor Browning, Clarence Winfrey, Celeste Winfrey, William C. Gilkey, Lawrence Katz, William R. Farrington and James H. Mulgannon.

After the government rested Mr. Sweeney made a motion for a judgment of acquittal on all counts of the indictment and argued the matter to the court. [Rep. Tr. 348-354.] He succeeded in convincing the court that the motion should be granted as to Count Two. [Rep. Tr. 350.] The case then proceeded on the remaining counts, that is Counts One, Three, Four, Five and Six.

Appellant called as witnesses William C. Gilkey, James H. Mulgannon, Evelyn N. Stein, Lorein Merle Babbins

and appellant. In rebuttal, the government recalled James H. Mulgannon to the witness stand. The motion for judgment of acquittal was not renewed.

The testimony of the witnesses is set forth hereafter in pertinent part.

Quentin Victor Browning (also known as "Duke" Browning) testified as a witness on behalf of the government. His address was in San Francisco, California. He had known appellant since approximately 1948. They met at McNeil Island Penitentiary during that year. [Rep. Tr. 70, 132.]

Mr. Browning saw appellant in the early part of January, 1956 at a bar on West Pico in Los Angeles, California. [Rep. Tr. 71, 134.] Apparently there was some conversation about the subject of heroin on the first meeting. Browning then merely told appellant that he, Browning, had been approached by a fellow that wanted some. Appellant told Browning that if he had the money he could go east and get a kilo of heroin, which is approximately 35 ounces. The two of them made arrangements to meet and talk later about it. [Rep. Tr. 71, 72, 133, 135.]

A couple of other meetings occurred between appellant and Browning and he told appellant that he had five thousand dollars. Appellant proposed to borrow a couple of thousand dollars from a friend of his to add to the \$5,000 for the purchase of the heroin. [Rep. Tr. 73, 138.]

One of the meetings between the two men took place when the appellant saw Browning in front of the Watkins Hotel and they talked in appellant's car. This was ap-

proximately the 7th of January 1956, and was the night before appellant was supposed to leave for New York. Browning went to his safe and got the \$5,000 which he gave to appellant (\$3,000 of which he had gotten from the other person who wanted some heroin and \$2,000 of which was Browning's), after they had a conversation in which appellant told Browning that he, Stein, had borrowed \$2,000 on ten per cent interest. Appellant further stated that he had borrowed the money from Jim "Berg-dog" (probably spelled "Birddog"). [Rep. Tr. 75, 138.] The two men decided that the kilo of heroin would be in sort of a "pool" and they would distribute it as partners. Browning was going to contact the people that he knew in order to sell the heroin. [Rep. Tr. 77, 78.]

During this time Browning had not talked to any government agents nor was he under arrest. [Rep. Tr. 139.]

Appellant was gone immediately thereafter for about ten days and when he came back, having left with \$7,000, he told Browning that he had picked up the heroin in New York. [Rep. Tr. 73, 139.] When Browning saw appellant then it was approximately January 17th. Stein was again out in front of the Watkins Hotel and Mr. "Berg-dog" was with him. Stein stated he would have to pick up the package the next day. Appellant and Browning agreed upon a meeting for the next evening, approximately the 18th of January. (The Mr. "Bergdog" died before the time of the trial.) [Rep. Tr. 79.]

The next evening appellant rented a motel on West Pico and Browning went over. Appellant showed Browning the merchandise and they talked about what to do with it. Browning further testified that by "merchandise" he was

talking about the heroin which was in four quarter kilos and in glassine bags. At that time appellant had the entire kilo of heroin with him. Browning and appellant cut up one quarter of it, which was kind of a grey powdery substance. [Rep. Tr. 80.]

In cutting the "merchandise," Browning and appellant used milk sugar and something called "Six X" which was also a sugar. They added an equal quantity of milk sugar to the heroin. Before that particular occasion Browning had seen heroin and had purchased it. [Rep. Tr. 81, 82.]

During the time Browning and appellant were cutting the one quarter kilo of powder, appellant told Browning that it would test out close to ninety per cent pure heroin. [Rep. Tr. 84.] Appellant also told Browning that he wanted to cut it a little further because he didn't think that people were entitled to that grade of merchandise for the price they had agreed to sell it for. The two men placed the substance into one-ounce packages and put them in glassine bags. [Rep. Tr. 86.] When they were finished they had approximately twenty ounces from the quarter of a kilo which was cut up. At the time Browning and Stein were cutting the heroin, each personally used a little of the narcotic. [Rep. Tr. 279.]

During the time that Browning did not see Stein, Browning did contact Clarence Winfrey at the latter's home on 27th Street in Los Angeles about five or six different times. Browning and Winfrey discussed the subject of heroin during those visits and Browning told Winfrey that he knew of "something that he might be interested in, and in the near future, in a few days, I would know for certain." The next day after appellant

returned Browning contacted Winfrey, who stated he would be interested in taking something, but that he was short of money. That night Browning went back to the motel and he and appellant "pro and conned it." [Rep. Tr. 90.] In other words, they discussed the amount of money that Winfrey had and the price for which they could sell it to him. Appellant told Browning that it would be all right with him if it was all right with Browning, that is to let Winfrey have some of the merchandise. [Rep. Tr. 91.] Appellant and Browning agreed to let Winfrey have one ounce for \$350. At that time Browning also told appellant that he had one fellow who wanted ten pieces of "stuff." (A "piece" meant one ounce and "stuff" or merchandise meant heroin.) Appellant and Browning further agreed to let the man who wanted ten "pieces" have it for \$300 an ounce and that Winfrey could have three "pieces" of "stuff" if he would pay for one. He could then owe appellant and Browning for two. [Rep. Tr. 92-95.]

The next day, on about January 19, 1956, Browning saw Winfrey. In fact, he took him three "pieces" of "merchandise" for which Winfrey paid \$350 in cash and owed appellant and Browning \$700. Winfrey was to pay the money that was due when he disposed of the "merchandise." [Rep. Tr. 103.] Browning also saw the other man who wanted some narcotics and gave him ten "pieces." [Rep. Tr. 96-99, 181.]

After Winfrey received the three ounces of heroin from Browning, appellant met Browning and the two of them went over to Winfrey's house. This was shortly after Browning saw Fred at the motel and they divided the kilo

of heroin. [Rep. Tr. 181.] That was in the latter part of January. [Rep. Tr. 185.]

Browning went up to San Francisco but just before he came down he called appellant and told Stein that Clarence Winfrey was "out" and that Winfrey wanted to make another buy. Appellant asked Browning if he had gotten the money and Browning told appellant that the latter should just give it to him and Winfrey would pay them later. Browning then gave appellant Winfrey's telephone number. [Rep. Tr. 100-102.]

When Browning came down from San Francisco it was about two or three weeks later. He had talked to appellant in the meantime. [Rep. Tr. 96-99, 181.] It was a Friday night and he met appellant out in Glendale or in San Fernando where they proceeded to "straighten" their business up. Browning gave appellant some money and they discussed the quantity of heroin that they had previously cut. Browning had contacted another party and that person wanted some "merchandise" and he told appellant of this fact. At that time Stein had the "plant" which meant the balance of the heroin, so whenever Browning wanted any he would contact appellant. When Browning told appellant that he had one fellow who wanted five "pieces" appellant told him that he had the "stuff." [Rep. Tr. 104, 105.] On this occasion appellant went out, returned and gave Browning twelve "pieces." [Rep. Tr. 106, 108.]

About a month after the two men cut the first quarter kilo, they cut a second quarter of the kilo in the same motel on West Pico in Los Angeles. During the months of January, February, March and April Browning got

approximately 51 ounces of heroin from appellant. As the result of the sale of the 51 ounces alone, appellant and Browning shared approximately \$10,000 to \$12,000. This was after appellant paid off \$3,000 that he owed on the heroin to the people back East. In the month of May, 1956, appellant and Browning split up their partnership on disposing of this particular kilo of heroin. Each took one-half of the remaining heroin (a quarter kilo each) which had not been disposed of. [Rep. Tr. 109-112.] Appellant wrapped up his quarter kilo and took it away. [Rep. Tr. 122.]

When appellant and Browning divided the balance of the kilo of heroin which was in San Francisco at Browning's house, there was a mistake in their computations of the money due to each one of approximately \$1,000. The two of them had sat down together and "pushed pencils." Then appellant went to Oakland to get the heroin, later returning to Los Angeles. The next morning Browning discovered that Stein had made a \$1,000 mistake in appellant's favor. [Rep. Tr. 114-118.] Browning immediately called Winfrey and asked him if he owed appellant any money. Winfrey advised him that he did and Browning asked him to hold it up until Browning got there. It was the balance of three "pieces" of "merchandise." [Rep. Tr. 119, 120.] Appellant and Browning thereafter settled the dispute. [Rep. Tr. 120.]

In the early part of September, 1956, Browning came down from San Francisco and purchased five "pieces" of "stuff" from appellant. Browning paid appellant \$3,000 for this heroin. Browning took it back up to San Francisco and sold it. [Rep. Tr. 124.] Browning knew that

this transaction happened in the early part of September but couldn't remember the exact date. [Rep. Tr. 127.]

Browning was arrested in the latter part of September, 1956, or the early part of October on a federal narcotics charge. [Rep. Tr. 147, 151.] The federal agents asked Browning where he was getting his narcotics and Browning decided to "clean the slate." He told them that he was getting them from appellant. [Rep. Tr. 148, 156.] These events took place in San Francisco, California. [Rep. Tr. 150.] Stein told the narcotics agents "everything" which had happened in 1956 but did not mention Winfrey's name then because he didn't know that anyone was interested in Winfrey. As a matter of fact, the first time anyone asked about Clarence Winfrey was in the grand jury proceeding in connection with appellant's prosecution in March, 1958. He was then asked about Winfrey and he told the grand jury all about him. [Rep. Tr. 150, 156, 159-162.] After he told the officers "everything" he also advised them that he would come down to Los Angeles and endeavor to make a buy from Fred Stein. Shortly after his conversation with the agents, probably in November, Browning called appellant long distance from San Francisco and made an appointment with him. This was at the number of a phone in a booth. [Rep. Tr. 125.] Browning left on Saturday night and got here on Sunday, approximately the 29th of November. [Rep. Tr. 126, 145.] Several telephone calls were exchanged between Browning and appellant after Browning arrived in Los Angeles. The two men met on Jefferson between Tenth and Eleventh Avenues. [Rep. Tr. 127.] Before Browning went to meet appellant, Mr. Mulganin, an agent of the Federal

Bureau of Narcotics at San Francisco gave Browning \$1800 in cash.

After Browning and appellant met they took a ride and Browning told Stein that he, Browning, had \$1800 and wanted to make a buy of heroin. Appellant told him that he would sell but didn't want to for less than \$500 an ounce. Stein then said he would take the \$1800. Browning then owed him \$300 as a result of the occasion when he bought the five "pieces" from Stein. Browning had been \$300 short since he had only \$2700.

Appellant took Browning's \$1800 and told Browning that he would see what he could do. Appellant dropped Browning off and called him later on the telephone. At that time he said the "man" wasn't there, that he couldn't contact him and it would be held up until the next day, a Monday. [Rep. Tr. 128, 129.]

Several telephone calls were exchanged back and forth, and appellant asked if Browning, wanted to pick it up in Bakersfield. Browning agreed to do so. Finally, on Monday evening Stein called Browning and told him that "it wasn't any go." On that evening appellant met Browning and told the latter that he couldn't do any business, "that the man was out and he had sold the last eight pieces of stuff in Bakersfield, and he was trying to stop some of it in Bakersfield so that I could have some, and which he was unable to do." At that point appellant gave Browning his "roll" of money. Browning did not count it at that time. Later, Browning returned the money to Mulganin, suggesting that it be counted. When it was counted there was only \$1500. Browning called Stein back and asked him why he took the \$300 out of "some-

body else's money." (Browning had told Stein that the purchase was for a Mexican boy that he had known in San Francisco.) Appellant told Browning that it wasn't "any of his affair," and refused to return the \$300. Browning had to make the \$300 good himself when he got back to San Francisco. Browning did not remember seeing Stein after that time. [Rep. Tr. 130-132.]

Clarence Winfrey testified on behalf of the Government in part as follows: He lived in Los Angeles, California, and he had first met "Duke" Browning in the year 1947. In January of 1956 Browning came to his house several times, once with Barney Stein, Fred Stein's brother, and his wife. The next evening Browning came by again and told Winfrey that he had something in which Winfrey might be interested. [Rep. Tr. 189, 190.] Browning and Winfrey at that time talked about narcotics. Winfrey told Browning that he would be interested if, in effect, the price and other circumstances were right. Browning asked Winfrey how many ounces he could use and Winfrey said he didn't know right then. Browning agreed to let him know in a few days. [Rep. Tr. 192.]

A few days later Browning came to Winfrey's home again and said that the person he was waiting for was back in town. He asked Winfrey how much the latter could use. Winfrey told him that all he had was about \$350. Browning said it would cost him \$350 for each ounce and that Winfrey could have three, two on consignment and one for cash. Winfrey agreed to take the deal. The next night Browning contacted Winfrey again and had the "merchandise" with him. Browning said he brought the "package," which Winfrey testified was three ounces of

heroin. Winfrey paid Browning \$350. Winfrey thereafter put about ten or twelve spoons of milk sugar in each ounce which he received from Browning. In other words, he cut it not quite fifty per cent. Thereafter Winfrey resold the heroin for \$200 per ounce. No one ever complained to Winfrey that it was not good "stuff." As a rule, he testified, no one ever used the word heroin, it is either a "package" or "merchandise" or "stuff." [Rep. Tr. 194-199.]

Winfrey saw Browning a day or two later on a social call. The next time Winfrey saw Browning the latter told Winfrey that he was going out of town, north. Within a day or two Mr. Browning had returned to Los Angeles and brought Fred Stein over to Winfrey's house. Winfrey recognized Stein from having seen him at McNeil Island. This meeting was in February or the latter part of January. [Rep. Tr. 200, 201.]

About ten days or two weeks after Browning left town appellant called Winfrey on the telephone. Appellant asked Winfrey if he needed any more "merchandise" and Winfrey told him "yes." Shortly thereafter, at Bronson and Washington, Winfrey gave the \$700, which he owed Browning for the two ounces of heroin he had received on consignment, to either Fred Stein or Barney Stein. At that time they were in a 1947 Dodge together, and he believed that he gave it to Fred Stein. This was about two weeks after he had gotten the "merchandise" from Mr. Browning. [Rep. Tr. 203-205.] Just previous to meeting Fred Stein at Bronson and Washington, appellant had called Winfrey on the telephone. Winfrey told appellant that he had something for "Duke" and Stein told

Winfrey that he, Stein, would pick it up. It was then that they made arrangements to meet at Bronson and Washington. Also, just previous to appellant's phone call, Winfrey had had a telephone conversation with "Duke" Browning about the \$700, and Browning asked Winfrey if he, Winfrey, was "ready" to get any more "merchandise" at that time. Winfrey told him "yes." Winfrey advised Browning that he had the money, and the latter stated that he would have somebody contact Winfrey for it. It was right after that that Winfrey gave the money to Fred Stein. [Rep. Tr. 206, 207.]

About the next evening after the \$700 was paid, appellant telephoned Winfrey and arrangements were made for the two to meet in a half an hour at the corner of Bronson and Washington, where they had previously met. They talked at that location about Duke Browning and Winfrey told appellant that he, Winfrey, had a proposition with Duke Browning. Appellant then said that he had talked with "Duke" Browning about Winfrey. Winfrey told appellant that he was ready for more merchandise, being out at that time. Appellant said he would contact Winfrey later. [Rep. Tr. 207-209.]

Later that evening Winfrey got another telephone call from Stein, who told Winfrey to meet him at the same place. Winfrey went out, saw him there and got three ounces of "merchandise" packaged in a cellophane bag.

Winfrey did not give appellant any money then, but did take care of the purchase price later when Browning and appellant had a "hassle" about some money. At that time Browning told Winfrey to hold the money until he could come to town to straighten it out with appellant.

[Rep. Tr. 210, 211.] Winfrey received the above three ounces from appellant in February of 1956. [Rep. Tr. 214.]

After that purchase, Winfrey bought more of the "merchandise" from Stein on approximately ten or twelve occasions. In each such transaction, Winfrey bought approximately three ounces. Each time it was taken by him on consignment, and he eventually paid for the merchandise at \$350 per ounce. After he got it from Stein, he would cut it with milk-sugar and resell it for \$200 an ounce. Several times Winfrey met appellant on Beverly Boulevard to obtain the "merchandise." Stein would hand the substance to Winfrey's wife who was sitting in the car on each of the occasions. The packages were all in cellophane bags, and the substance was an off-white powder. [Rep. Tr. 215-218, 238.] The largest quantity that Winfrey ever remembered buying from appellant was about six ounces. [Rep. Tr. 220.]

Clarence Winfrey bought more "merchandise" from appellant on three or four occasions in 1957 during January and February. On approximately March 3, 1957 he bought three ounces from him. This purchase was also made on the street and Winfrey's wife was with him again. [Rep. Tr. 220, 221.] At that time Winfrey gave him approximately \$700 but owed him the balance of the money.

Winfrey stated that on the occasions during 1956 and 1957 when Winfrey bought "merchandise" from appellant, Stein always contacted Winfrey by telephone to make the arrangements for delivery. [Rep. Tr. 221, 222.]

On March 12, 1957, Winfrey's wife, Celeste, was arrested on a narcotics charge. Immediately thereafter Narcotics Agents talked to Clarence Winfrey. Winfrey then called appellant on the phone several times in an effort to buy some narcotics from him. The price involved was approximately \$3000. [Rep. Tr. 223, 224.] Winfrey got about \$2100 from a narcotics agent, according to his recollection, and he had approximately \$1100 of his own money that he put in as a temporary loan to the Government agents. In one of the telephone calls, Winfrey told Stein he would like to talk to him and they made arrangements to meet. They did so across from the Pan Pacific Auditorium on Beverly Boulevard near where they had met before and had a conversation. Winfrey asked appellant about some narcotics, Stein told Winfrey he would let him know, but he couldn't give an answer at that time. Appellant asked Winfrey why the latter had not told Stein Celeste Winfrey had been arrested. Winfrey told appellant that he thought he knew about it, that quite a few people knew about it. From that time on it was just a matter of Stein telling Winfrey to wait, that Stein would let Winfrey know and they would ride around. [Rep. Tr. 224-226.]

Winfrey saw appellant during the first of June in 1957 and this was close to the last time he saw him. At that time Winfrey had a conversation with Stein. They talked about different sentences that people had been getting they had read about in the paper. One they discussed got 80 years and another got something like 30 or 50 years. [Rep. Tr. 227, 228.] At this time appellant was still telling Winfrey to wait about the narcotics, that he would let Winfrey know.

During the first part of July Winfrey had another discussion with appellant about narcotics and Winfrey told Stein that he was still interested in some. Appellant stated to Winfrey that nothing had happened yet but he would let him know if anything did. About that time they also had a discussion about a property loan that Winfrey was getting. Winfrey advised appellant that he was getting cash from the loan. [Rep. Tr. 229, 231.] Winfrey also stated that he was pretty well pushed and would like to get some narcotics because he was in pretty bad shape. Stein still said that he would let Winfrey know.

Stein never let Winfrey know. [Rep. Tr. 232.]

After Celeste Winfrey had been arrested, the Federal narcotics agents did not talk to Winfrey about a buy from Stein in the sense that he would help his wife out by trying to make a purchase from appellant. Winfrey did not go to the government agents and tell them that anything he could do to help his wife out of her difficulty would be done by him. The federal agents merely asked him where he was getting his narcotics from and he told them it was Fred Stein. [Rep. Tr. 242, 243.]

Winfrey testified that before he took the stand in the case government counsel had told him there would be no promises with respect to his wife and his testimony. Further, he was told that government counsel did not know the outcome of Celeste Winfrey's problem and there would be no commitment as to what might happen in that matter. He still agreed to testify after being so advised. [Rep. Tr. 251, 252.]

Celeste Winfrey testified in part as follows: she was Clarence Winfrey's wife and first saw appellant Fred Stein during the first part of 1956 when Mr. Browning brought him to the house. [Rep. Tr. 258, 259.] She saw him again on a street corner when she was in a car with her husband. Appellant handed her a package which was a little cellophane bag in a paper bag. In the cellophane bag was a whitish powder which the Winfreys took home with them. Thereafter during the year 1956 she saw Fred Stein on an average of once a month. Sometimes appellant made social calls to the house and other times they met him on the street corner. On the latter occasions Clarence Winfrey would give him money and Fred Stein would give them a package. Usually the amount that was given to appellant was from \$500 to \$1000. [Rep. Tr. 262.] All of the packages were similar. She saw Fred Stein on the street corner approximately 8 or 9 times on the same type of transaction. [Rep. Tr. 260, 261.]

On March 12, 1957, she was arrested. Prior to her arrest, the last time a transaction occurred on a street corner was about a week before. At that time appellant gave the Winfreys another package. Clarence Winfrey gave Stein a roll of bills. [Rep. Tr. 262.]

Mrs. Winfrey identified a man who was in court as "Stymie" Beard. During March of 1957 she had a transaction with Beard on one occasion when she gave him a half ounce. She got \$100 from him in cash. The one half ounce was from the "merchandise" that the Winfreys had gotten from appellant. Before the Winfreys had sold it they cut it. [Rep. Tr. 263-265.] The substance

in government's Exhibit 2-B resembled the powder which the Winfreys had previously gotten from Stein. [Rep. Tr. 265-267.] She testified further that heroin is an off-white color and that the Winfrey cut their merchandise with mik-sugar so that it was a lighter substance in color. the color of the heroin slightly. [Rep. Tr. 277.] After the sale to Beard, Celeste Winfrey was arrested for the sale of narcotics, as she had some marked money on her. [Rep. Tr. 268.]

After Celeste Winfrey left the stand, Clarence Winfrey was again called to testify. He was shown Exhibit 2-B. He testified that it resembled the substance which he had received from appellant except that it had been cut with milk-sugar so that it was a lighter substance in color. [Rep. Tr. 276, 277.]

Quentin Victor Browning was also recalled to the stand and examined Exhibit 2-B. He testified that it was similar to the substance which he had secured from Stein from time to time as he had previously testified. He qualified his answer by stating that 2-B had been "cut" quite a bit and that it was much lighter in color. [Rep. Tr. 278.] He also said that the material which he had secured from appellant resembled the material that he had used when he "took a bit once in a while." As a matter of fact Fred Stein and Browning had "done a little together" while they were cutting up the material previously. [Rep. Tr. 279.]

William C. Gilkey was called to the witness stand by the government and testified that he had been a federal narcotic agent since 1956. [Rep. Tr. 282.] He had first seen Clarence Winfrey during the early part of 1957, perhaps in January or February. Later in July of 1957

he saw Clarence Winfrey with appellant. In fact he saw them twice together in July. The first time was on July 9th near the intersection of Beverly Boulevard and Sierra Bonita Avenue. On that occasion Gilkey saw appellant drive to that area and Winfrey leave his own automobile and enter the car which Stein was operating. The two of them drove to a drive-in and remained there for about 20 minutes, then returning to the place where they met. Winfrey left the automobile, entered his own and joined the officers at a pre-arranged spot. [Rep. Tr. 283, 284.] Two days later Gilkey saw the two men together again at the same intersection of Beverly Boulevard and Sierra Bonita. Winfrey again drove to the area in his automobile, Gilkey following. Forty-five minutes later appellant arrived in another car and entered Winfrey's vehicle. At that time appellant lived only about three blocks from that spot. This was on the 11th day of July and the two men had a conversation. Gilkey related certain conversation that he had heard between appellant and Winfrey over a listening device, but Paul Sweeney was successful in causing the court to strike any conversation which was heard on the listening device. [Rep. Tr. 285, 288, 326.]

Gilkey testified that he was familiar with the language of those who were engaged in the illegal sale of narcotics and that his understanding of the word "stuff" was that it referred to heroin, cocaine or any narcotic drug. A "piece" was an ounce.

Gilkey further testified that on about March 14 Winfrey was furnished \$2100 by the government prior to his meeting with Mr. Stein, and that Winfrey also had about \$1000 of his own money. [Rep. Tr. 294.]

Gilkey was later recalled by the government and was shown Exhibit 2-A and 2-B. He stated that on March 12, 1957, he had purchased the exhibits from Matthew Beard for the sum of \$100 of official advance funds. He had purchased it from Beard approximately a block distance from Celeste Winfrey's residence. It was thereafter sent to the chemist in San Francisco, California. [Rep. Tr. 328, 329.]

The agent had seen Matthew Beard go in the direction of Celeste Winfrey's house just after Gilkey had given Beard \$100 of official advance funds and noted the serial numbers. He saw that money again shortly after Celeste was arrested on March 12, 1957, which was the same date Beard had gone into the Winfrey residence. The numbers of the bills were the same as compared to the original list of numbers. [Rep. Tr. 330-338.]

Among other things, it was stipulated, in effect, between the appellant and the Government that with respect to exhibit 2-B that a chemist employed by the United States Treasury Department in San Francisco who received that exhibit by mail at his office on March 14, 1958 submitted the contents of 2-B to a chemical test and that he would testify it was 210 grains of heroin. [Rep. Tr. 334, 335.]

William Farrington testified that he was a Deputy Sheriff for the county of Los Angeles, assigned to the Narcotic Detail. On March 12, 1957, he saw money given to Matthew Beard, the serial numbers of which had been recorded in his presence. Later that afternoon in the home of Celeste and Clarence Winfrey, he saw money found in the possession of Celeste Winfrey. The serial

numbers of those bills were identical to the serial numbers of the bills which had been previously given to Matthew Beard on the same day. [Rep. Tr. 341-343.]

After Agent Farrington concluded his testimony, the Government rested. Mr. Sweeney then made a motion for a judgment of acquittal of all of the counts of the indictment. [Rep. Tr. 348.] Argument was had at the Bench and the Court granted the motion as to Count Two. [Rep. Tr. 350.] The Motion was denied as to all of the other counts. [Rep. Tr. 350-354.]

After making an opening statement [Rep. Tr. 355, 356], appellant called Agent William C. Gilkey to the witness stand. [Rep. Tr. 356, 358.] The next witness for appellant was Agent Mulgannon. [Rep. Tr. 359.] Mr. Mulgannon testified to certain matters concerning a case involving Duke Browning in San Francisco. [Rep. Tr. 359-362.]

At the Bench, a discussion was had between court and counsel with respect to certain documents that Mr. Sweeney indicated he wanted in evidence. He mentioned that one was a photostat of a hotel registration and that there was some pertinent correspondence also. He indicated that he was hoping for a stipulation from Government counsel for the appellant to avoid subpoenaing a witness from New York. [Rep. Tr. 363-365.]

Evelyn Stein was called as a witness for appellant and she testified that on September 5, 1956, she left for New York City with Fred Stein and her daughter Lorien Babbins. [Rep. Tr. 385.] They arrived in Newark, New Jersey on the 6th and Fred Stein went on to New York

by plane. The witness went to Buffalo with her daughter because of her father's illness. [Rep. Tr. 366-371.]

On about September 12, the witness and her daughter traveled to New York and joined Fred Stein at the Seymour Hotel. They left on the 19th of September and returned to Los Angeles, arriving here the 20th. [Rep. Tr. 372, 373.]

Evelyn Stein also testified that on the 3rd day of March 1957, she and appellant left Los Angeles and traveled to Ensenada, Mexico to get married. [Rep. Tr. 374, 375.] However, they were married on March 6, 1957. [Rep. Tr. 377.] She received a marriage receipt dated March 6, 1957 and also a marriage certificate which was dated March 8, 1957. [Rep. Tr. 378, 379.]

The next witness for appellant was Lorien Merle Babins, daughter of Evelyn Stein. [Rep. Tr. 401.] She testified with respect to the alleged trip to New York on September 5, 1956 with her mother and Fred Stein. [Rep. Tr. 402-405.] She also testified that her mother and Mr. Stein took a trip on March 3, 1957 and that they returned to Los Angeles about the 7th or 8th of that month. [Rep. Tr. 406.]

The last witness for the defense was appellant. Stein testified that he resided in Los Angeles [Rep. Tr. 409] and that during 1956 and 1957 he was a used car salesman, in business for himself some of the time and on other occasions selling cars on consignment. He first met Mr. Quentin Browning at McNeil Island in 1948. [Rep. Tr. 410.] He stated that the next time he saw Browning was in the latter part of 1955 when the latter came to Los Angeles. Previously Browning had sent Stein a

letter in which Browning had asked Stein to collect some money for him which was due for a sale of narcotics. Browning also told Stein in the letter that he, Browning had a “pretty fair connection” and if Stein would contact him that Browning would make arrangements to come to Los Angeles and discuss the connection.

When Browning came down in December of 1955, he contacted Stein by going to a bar where he had sent the above letter. Appellant did not own the bar but it was about 10 minutes from his home. [Rep. Tr. 411-413.]

A couple of days later Stein went to the bar and Browning was waiting for him there. They had a conversation at that time. [Rep. Tr. 414.] When asked if there was any discussion of narcotics during the first conversation at the bar, Stein said “not the first time.” [Rep. Tr. 415.]

Stein claimed that he saw Browning after this first meeting at the Watson Hotel on West Adams Boulevard in Los Angeles. Stein had given Browning his phone number and Browning called Stein. Stein had also given Browning his brother's phone number in case he couldn't get in touch with Stein at his own number. This second meeting occurred about four or five days after Stein met Browning in the bar and was still during the first part of January 1956. [Rep. Tr. 415.]

Stein claimed that on the occasion at the Watkins Hotel he had a conversation with Browning about some “good horse information.” Browning then supposedly asked Stein for \$300 because he had his money tied up in a Western Union Money Order which he didn't have time to pick up. Stein gave Browning \$300 and Browning went to the track. [Rep. Tr. 416, 417.] Stein said he did not

see Quentin Browning from the time he saw him in January of 1956, when he allegedly gave Browning the \$300, until the 2nd of December 1956. [Rep. Tr. 429.]

Stein recalled meeting Mr. Winfrey in the company of Browning sometime during the first part of January. Stein met him at the bar and Browning explained that Winfrey was from McNeil. The two of them got into a car and drove over to Winfrey's home and saw the latter there. [Rep. Tr. 418.] Stein testified that there was no discussion of narcotics during the conversation which was had at Winfrey's home at that time. [Rep. Tr. 419.]

Stein testified that he went to the Winfrey home once or twice thereafter but never met him on the street. [Rep. Tr. 419.] Appellant claimed that the only telephone conversation he had with Winfrey during the year 1956 was toward the end of the year, that Winfrey called him two or three times. [Rep. Tr. 420.] During one of those conversations Winfrey asked Stein to drop by his house. Stein did and Winfrey told him that he hadn't seen Duke in sometime and "he needed something and where could he lay his hands on some things." Stein knew that he had reference to heroin. [Rep. Tr. 421.] On each of the occasions in which Winfrey called Stein, they would make arrangements to meet. At the time of seeing one another they would have the same general type of conversation. At one time they met on Sierra Bonita. [Rep. Tr. 421, 422.]

On one occasion Stein met Winfrey at Sierra Bonita and Beverly, across the street from the Pan Pacific. [Rep. Tr. 423, 424.] Winfrey and Stein took a ride and stopped

at a drive-in, where they talked. Winfrey kept telling Stein "how hard things were for him." [Rep. Tr. 425.]

A few days later Winfrey and Stein had another conversation in a '57 Chevrolet while the two of them were riding in it. [Rep. Tr. 426.] On that occasion Winfrey again started telling appellant "how bad things were with him." Stein told Winfrey that "they were bad for me too." Winfrey asked Stein if he could possibly tell Winfrey where to go so that he "might help himself." [Rep. Tr. 427.] Winfrey also told Stein that he was going to borrow some money on his home and asked appellant to try to find a "connection" for Winfrey. [Rep. Tr. 428.] At that time Winfrey told Stein that he wanted to get a supply of heroin to sell. The loan which he was going to get on his home would have netted Winfrey \$1000 and Winfrey wanted to buy the narcotics with that money. This was near July 11th. [Rep. Tr. 467.]

Winfrey had also asked Stein for some heroin during the first part of 1956. [Rep. Tr. 459, 463.] When Clarence Winfrey spoke to Stein on at least one such occasion during that time and asked him for "something," Winfrey was talking about narcotics, specifically heroin. [Rep. Tr. 463.] Winfrey told Stein that Duke Browning was in Seattle and he couldn't get in touch with Duke. The reason that Winfrey asked Stein for some heroin was because of Duke's absence. Winfrey had been getting it from Browning and Stein knew this. [Rep. Tr. 459.]

Stein further testified that all during 1956 Browning used to come to Los Angeles for the races and then return to San Francisco. Browning was used to sending money to Fred Stein's brother to bet on the horses for him.

Browning used to play \$300 on a horse, "win, lose or draw." [Rep. Tr. 417, 460.] Browning would always send the money down by Western Union. [Rep. Tr. 461.] At least on one occasion Duke Browning won \$1,100 on a horse. [Rep. Tr. 462.]

Stein admitted that \$700 was paid by Clarence Winfrey in late January or early February 1956, but claimed that it was to bet on two horses. [Rep. Tr. 466.]

Fred Stein testified that he saw Quentin Browning on the 2nd of December 1956 on Jefferson near 11th Avenue. This was about six o'clock in the evening. [Rep. Tr. 429.] Browning got into Stein's car and they had a conversation in which Stein told Browning that he knew of a race in Florida that was to be fixed. Browning asked Stein if the latter could bet some money for him and Stein agreed. [Rep. Tr. 430.] At that time Stein was parked on the street at the above location and Browning had come up in his own car which he parked there. [Rep. Tr. 471.]

When appellant agreed to bet some money for Browning, the latter told appellant that he had about \$1800 and appellant took it from Browning. Appellant called Browning later and told him that he, appellant, couldn't get it "down" but that he might be able to do it the next day. However, the next day Stein counted off \$300 which Browning owed him and then called Browning at Browning's sister's house. [Rep. Tr. 430.]

The whole transaction had been a ruse, Stein claimed, to get Browning to come to him and pay the \$300 back to Stein. Although Fred Stein's brother was "making book" during 1956 [Rep. Tr. 432], and Browning had been betting at least \$300 per transaction with the brother,

on one occasion winning at least \$1,100, Stein used this method of recovering the alleged year old debt from Browning. [Rep. Tr. 431, 432.]

On the 3rd of December 1956 Stein called Browning and asked the latter to meet him at the same place of the previous day's meeting.

All that happened on the occasion of the 3rd was that Browning met Stein at Jefferson and 11th Ave. and Stein pulled up along side the sidewalk where Browning was standing. Stein then reached over to the right-hand window of the car and told Duke he couldn't make the bet and then gave the \$1500 to Duke. Browning reached in the car got the money and put it in his pocket, without counting it. In other words Browning was standing outside of Stein's car and reached in through the window. After Browning put the money in his pocket Stein drove off. Appellant didn't let Browning get in the car because he didn't want any trouble with him. Appellant figures Browning might start counting the money, note the \$300 shortage and then create some difficulty about it. Appellant did not want this to happen. Browning later called Stein and they had a discussion about the money that Stein had deducted from the \$1800. [Rep. Tr. 431, 470, 474, 475.]

Stein testified as that on September 5, 1956 he started on a trip to New York City with Evelyn Babbins and her daughter, arriving on September 6th. Paul Sweeney attempted to get in evidence a photostatic copy of a letter allegedly from the manager of the hotel Seymour in New York City. The Court stated that the letter would not be admissible [Rep. Tr. 435], and denied a motion for a

continuance for the purpose of subpoenaing that witness. [Rep. Tr. 436.] This was outside of the presence of the jury. [Rep. Tr. 435.] However, Sweeney was successful in having a registration slip for that hotel admitted in evidence which Stein testified he signed when he was back in New York. [Rep. Tr. 438, 439.] Stein also testified he took a trip beginning the 2nd day of March 1957 with Evelyn Babbins to Ensenada for the purpose of getting married. He claimed that he arrived in Ensenada on the 3rd of March 1957 [Rep. Tr. 440], but that he and Evelyn Babbins were not married until the 6th of March in Tijuana. [Rep. Tr. 441.]

On direct examination Stein had testified that in 1956 and 1957 he was a used car salesman, at times in business for himself and occasionally selling cars on consignment, as indicated above. [Rep. Tr. 410.] On cross-examination further testimony was given with respect to that particular occupation. He then testified that his total income during the time he was in that business for the year 1956, when he had no other occupation, was about \$1800, to \$2000. The total "gross" he later testified was about \$2000 or \$2500. [Rep. Tr. 451, 476, 477.]

Stein also testified that he paid a share of the expenses on the trip to New York and it cost him about \$650. This was in addition to the \$300 that he had loaned Quentin Browning that same year of 1956, so that he had expended for those items alone \$950 out of his total income of about \$2000. When he added the hotel bill for the New York stay, the total expenditures came to about \$1,100. [Rep. Tr. 477, 478.]

Appellant was convicted in 1946 for receiving, concealing and facilitating the transportation and concealment after importation of smoking opium. [Rep. Tr. 451, 452.] Stein had also been convicted in February, 1935 for the unlawful selling and dispensing of morphine in violation of 26 U. S. C. Section 692. [Rep. Tr. 480.] On June 30, 1938 appellant was again convicted of a charge of possession of opium and in the same year had a felony conviction for counterfeiting. [Rep. Tr. 481, 482.] On cross-examination Stein volunteered that he had known a person named as Jim Birddog during the "bootlegging" days. [Rep. Tr. 456.] It was after that the Court asked appellant "You say you knew him in the bootleg days?" Stein answered affirmatively and the Court asked what their relationship was. Stein then said he would buy alcohol from that person and Birddog would buy whiskey from him. [Rep. Tr. 458.]

On rebuttal, the Government called Agent James H. Mulgannon of the United States Bureau of Narcotics in San Francisco and he testified that he had seen Fred Stein and Browning together on December 2, 1956, at Jefferson and 11th in Los Angeles, California. This was just after Mulgannon gave Browning the \$1500 of official advance funds. Mr. Chappel gave an additional \$300 to Browning. [Rep. Tr. 490, 491, 492.]

Mulgannon testified that after Browning got into Stein's car on the 2nd, they cruised around in an area that covered about ten or twelve blocks. Mr. Stein was driving the automobile during this entire time. The car was driven very slowly, entered some dark streets and just cruised back and forth aimlessly for about 15 to 20

minutes. Browning returned under surveillance without the money. [Rep. Tr. 495-497.]

The next day on December 3, 1956, at about 8 o'clock in the evening, Browning was searched again at Agent Richards' home and no funds were on his person. He met Stein on the corner of Jefferson and 11th. Browning left his own automobile and entered appellant's automobile. [Rep. Tr. 498, 499.] Although appellant had testified that Browning did not get into his automobile on the occasion of the third, and that there was merely an exchange of money, after which Stein drove off, Mulgannon testified that Stein started his automobile after Browning entered and they drove around from approximately 7:15 to 8:10 P.M. [Rep. Tr. 498, 500.] The automobile did not stop anywhere and Stein drove very slowly about 10 to 15 miles an hour up dark streets, making left and right hand turns in the darkened area. Stein went back and forth retracing his movements through the vicinity. [Rep. Tr. 500, 501.] When Browning came back on the 3rd from this occasion there was \$1500 on his person. [Rep. Tr. 506.] After the Government concluded rebuttal the motion for judgment of acquittal was not renewed. [Rep. Tr. 507, 508.]

Counsel for both appellant and government had an extensive conference with the court with respect to instructions. [Rep. Tr. 509-524.]

Thereafter argument was made to the jury by both the government and appellant. [Rep. Tr. 525-601.] Each of the parties finally stated that there were no exceptions to the proposed instructions. The Court then instructed the jury [Rep. Tr. 604-634], and the jury retired at 12:30

P.M., on Monday September 22, 1958. At 3:30 P.M. the jury returned with a verdict of guilty as charged in Counts One, Three, Four, Five and Six.

After the jury was excused Paul Sweeney advised the court that there would be a motion for new trial or a "motion for verdict notwithstanding the verdict of the jury." The Court stated that he would be gone beginning "the day after tomorrow" and would "not return until November." There does not appear to be any statement as to whether or not the court was on vacation or would be absent on official business. Mr. Sweeney then said: "I guess I will have to argue tomorrow. What time would your Honor set?" [Rep. Tr. 639.]

On September 23, 1958, the case came on for sentence and further proceedings. Mr. Sweeney presented a motion for new trial on certain grounds set forth in the transcript. [Rep. Tr. 642, 645.]

Among other grounds presented was the fact that the defendant was not granted a continuance in order to secure additional counsel. [Rep. Tr. 645.] The Court stated with respect to that ground:

"In connection with your comment on the last reason, that the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, that the defendant was not granted a reasonable continuance in order for him to secure additional counsel, I have been a member of the bar since 1916, I have been on this bench since 1942, and I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, did not do in the protection of this defendant's rights.

“The case was tried skillfully and adroitly on behalf of the defendant by you, and I cannot see how his rights would have been prejudiced by securing any additional counsel.”

The motion for new trial was denied. [Rep. Tr. 646.]

Afer the motion for new trial was argued, the Court sentenced the defendant to a total of 50 years, stating:

“The Court, in view of this defendant’s past history and the fact that he has been engaged practically all of his life in a life of crime, feels justified in completely isolating him from society.” [Rep. Tr. 651.]

Appellant filed his notice of appeal on September 26, 1958. [Clk. Tr. p. 74.]

IV.

ARGUMENT.

(1) There Was No Abuse of Discretion in the Denial of Motion for Continuance.

It is clear that the granting or refusal of a continuance “is within the sound discretion of the Court and not subject to review in the absence of a clear showing of abuse.”

Davenport v. United States, 197 F. 2d 157 (5 Cir., 1952).

It is submitted that a review of the entire record of the proceedings before the trial court shows that there was no abuse of discretion. This is particularly true since the record reasonably leads one to the inference that appellant was merely engaging in dilatory tactics to obtain a fourth trial setting on September 16, 1958, in a case which had been first called for trial as early as June 17, 1958.

Attorney Paul Sweeney appeared with appellant on September 16, 1958 when the case was called for trial for the third time. The jury panel was in the courtroom, ready for selection. Appellant made his motion for continuance with no advance warning. There was no written motion or affidavits filed in support of the various claims made by appellant and his attorney, even though the situation mentioned as one of the grounds for continuance had occurred at least two weeks prior to September 16, 1958 and appellant had discussed the matter with Mr. Sweeney in the interim.

Appellant's opening brief is replete with statements which are not supported by the record. On page 6 appellant claims that Paul Sweeney moved for the continuance upon the ground that he was at the time charged with a violation of the State narcotics law and with offering a bribe to state and county officials, citing California code sections. The record shows that Mr. Sweeney advised Judge Hall only that there was a question of recent publicity on his arrest on a "bribery" incident. [Rep. Tr. 7.] The record is devoid of any mention that his case involved narcotics charges. The two "samples" of the newspaper clippings mentioning a narcotics case against "Paul Wesley Sweeney" which counsel for appellant has felt "justified" in attaching to his brief were not brought to the attention of the trial judge. Thus the Court had no opportunity to consider that factor in ruling on the motion. Also, at page 6, counsel states that Mr. Sweeney was appearing for the appellant at the opening of the trial "for the sole purpose of getting a continuance." The record lacks any mention by Mr. Sweeney or by the appellant during the

proceedings below that Mr. Sweeney was appearing for the "sole" purpose of making the motion.

Appellant came to Court on September 16, 1958 with the attorney of his choice and was actually prepared to go to trial if the motion were denied. Although an appearance praecipe was filed on April 7, 1958, showing Harry E. Weiss as the attorney in the case, Mr. Weiss had "stepped out" as the attorney as of June 17, 1958, according to appellant's own admission. [Rep. Tr. 62.] Even before that time, Paul Sweeney had appeared as counsel for the defendant on two occasions, once on April 3, 1958 when he succeeded in getting the bond reduced to \$10,000 and again on April 28, 1958, when he appeared on a hearing for the defendant's motion for a bill of particulars. At that time, the not guilty pleas to all six counts of the indictment were entered and the cause set for trial June 17, 1958. On the latter date appellant appeared with Mr. Sweeney and requested a continuance. It was then set for jury trial on August 12, 1958. [Clk. Tr. 33, 34; Rep. Tr. 61.] On August 12, 1958, the appellant appeared again with Paul Sweeney and secured another continuance of the trial date to September 16, 1958. Appellant himself knew that the cause was set for trial September 16, 1958. [Rep. Tr. 63, 64.] He then tried on that date to convince the court that the attorney who was not there was his attorney and that the attorney who was there was not his attorney. However, when Judge Hall indicated that Mr. Weiss would be called in for his version of the affair, in effect calling appellant's bluff, appellant admitted that Mr. Sweeney had been his attorney since June 17, 1958.

Not only does the record of the trial itself show that Paul Sweeney and appellant were ready for the trial of the case on September 16, 1958, but the colloquy between the parties at the bench on the motion for continuance proved appellant was prepared.

Although Mr. Sweeney stated that "he was totally unprepared to go to trial" and did not prepare the defense, and alleged that he was "just aware of the fact that we were going to trial Friday of last week," it was admitted that Mr. Sweeney had prepared defenses toward the overt acts in the indictment. [Rep. Tr. 6.] Further, appellant stated that he had told Mr. Sweeney "all the facts in the case" and that Sweeney had advised him of the law and as to his rights. [Rep. Tr. 64.] Also, Mr. Sweeney stated that he though appellant had been "satisfied" with his services to that point and was "confident to have me continue." [Rep. Tr. 67.] With respect to Mr. Sweeney's statement that he only knew on the Friday of the previous week that he was going to trial on September 16, 1958, the court had before it the statement of government counsel that as far as she knew, Mr. Sweeney was under the impression the previous week and sometime before that the trial would proceed on the 16th. [Rep. Tr. 8.]

No excuse whatsoever was given by attorney Sweeney or appellant as to why the matter was not brought to the court's attention before the morning of the trial, contrary to appellant's claim at page 42 of the opening brief.

The Court advised Mr. Sweeney and appellant that the "bribery" incident had "occurred long enough ago that some change in counsel should have been made by this time." [Rep. Tr. 8.]

Even if appellant had not signed the praecipe showing Paul Sweeney to be his attorney, the record is clear that Paul Sweeney was indeed his counsel. Thus the Court would have had every right in exercising his discretion by denying the continuance at that point. It is also clear that the court did not force appellant to sign the praecipe which was filed on the 16th showing Paul Sweeney to be his attorney. The court stated at the time of the inquiry, "It is up to the defendant to make up his mind." [Rep. Tr. 67.] As shown in our statement of the case this was the second time the court had made that statement to appellant. Judge Hall had asked appellant if Mr. Sweeney was his lawyer and he replied "Yes." The Court then allowed appellant the opportunity of sitting down at a table to discuss the matter with Mr. Sweeney. A few moments recess was declared for that purpose. Judge Hall stated to appellant "You make up your mind whether or not Mr. Sweeney is your lawyer." [Rep. Tr. 65, 66.] It is obvious that during that conference with his attorney, appellant must have decided that he could not fly in the face of the facts. He had an opportunity to refuse to sign the praecipe but he did not do so. He thus waived any complaint against proceeding with Paul Sweeney as his attorney.

Apparently appellant was indeed satisfied to have Mr. Sweeney proceed with the trial of the case, after his efforts to obtain another continuance failed, since there was no other counsel associated in the matter, although Mr. Sweeney indicated that he might have another attorney associated in the case the next day. Mr. Weiss did not show up, which is a further indication of the fact

that Paul Sweeney was actually appellant's attorney and was the one who was prepared for the trial of the matter.

There was no showing during the selection of the jury that any of the members of the panel had had anything to do with Paul Sweeney. Further, the jurors indicated that they would be willing to risk their own rights and liberties, or those of one near and dear to them, at the hands of a jury of men and women who felt towards appellant as they then felt toward him. [Rep. Tr. 23.]

Thus, the record of the hearing on the motion clearly shows that the court did not abuse his discretion in denying the oral motion for continuance. Further, a review of the record of the trial shows that Attorney Sweeney made a vigorous and competent defense for appellant, on cross-examination of government witnesses, during the proceedings connected with the trial and the presentation of appellant's case. Appellant was not deprived of any testimony which was necessary for his defense. A difference of opinion of present counsel for appellant on appeal as to various points of trial strategy or tactics does not detract from the fact that appellant was not deprived of the effective service of counsel. Even if it could be said that any errors were made in the representation of appellant during the heat of trial, it cannot be said that they were significant or resulted from anything involved in Sweeney's personal life. It is obvious that, in spite of his spirited representation, the *weight of the evidence* was the determining factor in the verdict of guilty on five counts which was returned by the jury.

Judge Hall was fully aware of the competency Mr. Sweeney displayed in defending appellant. He had watched,

as well as heard Sweeney during the trial and he stated that he knew of nothing that any other or additional counsel could have done for Stein that Mr. Sweeney did not do in the protection of his rights. His comments are entitled to great weight by this Court, which has only the printed record before it.

In the case of *Williams v. United States*, 203 F. 2d 85 (9 Cir., 1953), Judge Stephens of this court stated

“the granting of a continuance is not a matter of right, but is always within the sound discretion of the court. Nor will the court’s exercise of its discretion be disturbed unless it is abused to the prejudice of the complaining party. * * * The record indicates that the trial was held 13 days after the request for a continuance was denied; and there is no showing that appellant made any attempt during that time to substitute counsel. *More to the point, the record discloses a sustained, vigorous and alert defense* by appellant’s attorney during the trial. There was no error in refusing to grant a continuance.” (Emphasis ours.)

In *Hutson v. United States*, 238 F. 2d 157 (9th Cir., 1956), Judge Barnes of this Court cited the *Williams* case and stated: “Whatever we may think of merits of the two motions, we cannot reverse, save for an abuse of discretion.”

In *Sherman v. United States*, 241 F. 2d 329 (9th Cir., 1957), this Court at page 338 held that the granting of a continuance “is a matter of discretion of the court, and will not be reviewed upon appeal in the absence of abuse.” The *Williams* case was cited and quoted in that decision. The opinion went on to state “the record is devoid of any

such showing of prejudice to appellant by denial of the motion.”

Judge Bone of this Court wrote in the case of *Thomas v. United States*, 252 F. 2d 182 (9th Cir., 1958) as follows:

“The first error urged by appellant is that the trial court erred in failing to grant an early adjournment for the day when requested by appellant’s counsel on grounds of his ill health. It is appellant’s contention that this failure on the part of the trial court denied her effective assistance of counsel in violation of Amendment Six of the United States Constitution.

* * * We find no merit in this contention.

“The case of *Glasser v. United States*, 315 U. S. 60, * * * upon which appellant principally relies bases it holding as to ‘Assistance of Counsel’ upon a showing that *some* prejudice resulted to the defendant by the appointment of one of his attorneys to represent one of his co-defendants. It is from this basis that the Supreme Court in the *Glasser* case held that it was unnecessary for the defendant to show *exactly* wherein he was prejudiced and that any interference with the defendant’s right to effective assistance in counsel is sufficient to constitute a denial of effective assistance of counsel.

“There is no such showing in the case at bar. *Examination of the record shows a careful and spirited defense overwhelmed by a great quantity of evidence tending to show the guilt of appellant.* [Emphasis ours.] The defense in no way indicates that appellant’s attorney was laboring under such an illness as to substantially impair his effectiveness. It has been held that without some showing in the record that the illness of counsel was of such a nature as to have effected the defense presented it will not be held to be a denial of assistance of counsel. . . . We agree.”

See also:

United States v. Rosenberg, 157 Fed. Supp. 654
(U. S. D. C., Pa., 1958).

In *United States v. Yager*, 220 F. 2d 795 (7th Cir., 1955), the Court of Appeals was considering the denial of a motion for continuance. "There can be no error in denying a motion for continuance unless it is clearly shown that there has been an abuse of discretion." In that case, when it was called for trial, the defendant's attorneys moved for a continuance claiming they had been employed only an hour or two previously. The defendant had previously employed counsel who later withdrew from the case with his consent. The defendant had either six or twelve days notice of such withdrawal. The court denied the motion pointing out that there would be an adjournment after the selection of the jury and that counsel would then have opportunity to confer with the defendant. At the end of the opinion the Court remarked: "*In fact, a reading of the transcript discloses that defendant's counsel gave him vigorous representation throughout the trial period.*" (Emphasis ours.)

In *United States v. Nirenberg*, the appellant contended it was error to deny a *further* continuance. The court stated at page 634:

"We do not agree. We hold that Judge Bruchhausen's denial of a further continuance was a sound exercise of his discretion . . . Moreover *a reading of the transcript discloses no prejudice due to lack of preparation: Mr. Hanrahan appears to have conducted a thoroughly workmanlike defense.*" (Emphasis ours.)

The attorney in that case had received two continuances in the matter. He thereafter requested another week's delay representing that the pressure of other trial work "had prevented the preparation necessary for this trial." The motion was denied and the case was tried a full three months after the indictment was returned.

Although the following case involved an appeal from an order denying a motion under 28 U. S. C. Section 2255 to vacate four separate judgments of conviction for narcotics offenses, it is felt that the language in the opinion is pertinent to the within case. In *Sanchez v. United States*, 256 F. 2d 73 (1 Cir., 1958) the court stated that one of the grounds for setting aside three of the four convictions was that counsel's representation of the accused was so incompetent and ineffective as to amount to a denial of counsel to which the accused is entitled under the Sixth Amendment. In affirming the order of the District Court, the Court of Appeals remarked that:

"At the trial the counsel engaged in vigorous cross examination of the government witnesses, though probably for prudential reasons they did not put the defendant on the stand. At the conclusion of the consolidated trial the judge thanked counsel for their intelligent efforts to make the best defense that in the circumstances they could make.

"These attacks upon the competency of counsel are not received with much sympathy by the court . . . Certainly the judge who presided at the trial, . . . was perfectly well aware of the services rendered by court-appointed counsel . . ."

In considering the denial of a motion for a continuance because of the illness of local counsel who had been re-

tained to represent appellant (the partner of the attorney who was ill appeared and conducted the trial in his stead) it was stated in *Franken v. United States*, 248 F. 2d 789 (4th Cir., 1957) that "as the attorney appearing in court was a trial lawyer of ability who had served as United States Attorney of the District, and as it does not appear that there was any failure to secure proofs desired by appellant or that appellant was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground.

Similarly, the court in *United States v. Mathison* 238 F. 2d 358 (7th Cir., 1956), held:

"Defendant also argues that the trial court erred in denying his motion for a continuance on the premise that there had not been sufficient time to properly prepare his defense. We have examined the circumstances regarding this contention and find it without merit. As the cases universally hold, action on such a motion is a discretionary matter with the trial court. Certainly the record does not demonstrate any abuse of discretion."

An assignment of error was made to the action of a trial court in refusing a continuance on the ground that the defendant's sole counsel was sick and absent and the court in *Hardie v. United States*, 22 F. 2d 803 (5th Cir., 1927) said in its opinion:

". . . it appears that Mr. Bloodworth had secured a continuance of the case on the grounds of his illness for at least six months and at least *two weeks before the trial* plaintiff in error knew Mr. Bloodworth would not be available for three or four months thereafter. Plaintiff in error had ample opportunity to secure other counsel, and did in fact

do so, and was represented by counsel on the trial. The allowance of a continuance is generally within the discretion of the trial court. There was no abuse of discretion in this case.” (Emphasis supplied.)

Appellant claims that Attorney Sweeney’s representation of appellant at the trial was weak, inadequate and incompetent. However, in considering the defense as a whole, Mr. Sweeney’s representation was, as Judge Hall put it, skillful and adroit. Attorney Sweeney vigorously cross examined all of the government’s witnesses, not only thoroughly questioning them on the events to which they testified, but he brought out all of the matters which might have affected their interest in testifying in the case. On a motion for judgment of acquittal at the end of the government’s case, Mr. Sweeney succeeded in obtaining an acquittal with respect to Count 2, upon which the defendant would have been subject to another sentence of a minimum of five years or a maximum of twenty. Upon presenting his defense Mr. Sweeney was not precluded from showing the things which pertained to the defendant’s case, and he did so. Present counsel for appellant has only raised one item which was mentioned during the trial but which was not received in evidence. It was a letter from the manager of the Hotel Seymour where the defendant claimed to have stayed in New York from approximately September 6 to about September 19, and Attorney Sweeney said he had hoped to receive a stipulation from the government for its introduction. Yet, the registration card from the same hotel was admitted in evidence during testimony given by appellant. The manager’s testimony, if he had appeared in person, would have added little or nothing to the material which was contained

on the registration card. Anyway, it should be remembered that Duke Browning was not sure he had purchased the five ounces of heroin from appellant on September 10, but stated that it was early in September. The appellant's proof of his trip to New York was not a "complete answer to Browning's testimony" since the sale still could have been made immediately before appellant allegedly left for New York on September 5, 1958. Further, appellant also offered proof of the trip through his wife and his stepdaughter, as well as his own testimony. It could not possibly be said that the defense maneuvering on the letter was due to anything other than an attempt to put in evidence cumulative evidence which would have been extremely expensive to produce by a witness.

In attempting to pick apart Attorney Sweeney's representation, present counsel for appellant on appeal has listed various other items which prove to be only his version of how the defense should have been handled. However, as Judge Hall stated, there was very little else that Mr. Sweeney could have done in presenting the appellant's case. In considering Mr. Sweeney's representation *as a whole*, the particular points listed on appeal, in a flyspecking diversion, if we may be allowed so descriptive a phrase, add nothing to the claim that the defendant suffered prejudice as a result of Sweeney's representation. In fact some of the statements contain allegations that are remarkable in their departure from the record. For instance it is claimed that Mr. Sweeney failed to request the court to give appropriate instructions on the law relating to conspiracy, accomplices and alibis. It is to be noted that during a fairly long instruction conference in which Mr.

Sweeney participated, the subject of conspiracy was adequately discussed, the court agreeing to give certain instructions on that subject. Mr. Sweeney also requested the court to give an alibi instruction [Rep. Tr. 513-516] as well as an instruction which related to accomplice testimony, "all evidence of witnesses whose self-interest are shown to be such as may prompt testimony unfavorable to the accused should be considered with caution and weighed with great care." [Rep. Tr. 523.] Also, the court had previously stated that he would give instruction No. 12 [Rep. Tr. 511], which is shown to be the instruction on accomplices. [Clk. Tr. 44.] As a matter of fact, the instruction on the subject of accomplices was given by the court to the jury. [Rep. Tr. 611.] The court also gave an instruction on the subject of alibi. [Rep. Tr. 630.] The instructions also properly covered the subject of conspiracy. Present counsel fails to point out in what particulars he thinks any of these instructions are erroneous, thus leading one to the inference that he actually has no basis for the criticism. With respect to appellant's charge that Attorney Sweeney failed to recognize the importance of the testimony of Duke Browning, it is to be noted that Mr. Sweeney did move to strike the entire testimony of Quentin Browning, although on a different basis than set forth on Page 24 of appellant's opening brief. However, it is submitted that the grounds now proposed by a late comer to the action, would have resulted in the same ruling by the court on Attorney Sweeney's motion: "It is a question of fact for the jury in any event." [Rep. Tr. 175, 176.] It is obvious that there was sufficient testimony to go to the jury on the substantive counts and as to the length of time during

which the conspiracy continued. Although Stein and Browning had a so-called partnership or "pool" as to one particular kilo of heroin, they still continued to do business in the buying and selling of that narcotic drug up to September 1956, but on a different financial basis. Although the question of the evidence on the conspiracy count is not necessarily involved in this appeal, particularly since appellant received a concurrent sentence on that count, Attorney Sweeney did not fail to recognize the importance of the testimony that Browning gave. He may well have refrained from making a motion on the ground now proposed by present counsel because the weight of the evidence is sufficient to show that Browning and appellant continued in the conspiracy together after May, 1956.

The question of whether or not an attorney must *always* make a request for the statements which a witness who has taken the stand has previously made to the government is one which is fairly debatable. The solution of this point, like most of the others which present counsel has raised, lies normally in the exercise of sound discretion on the part of the attorney, according to the particular circumstances of each case. Although Section 3500(b) of Title 18, U. S. C. provides for the production of the statement of witnesses, it is only by motion of the defendant, who may choose not to take advantage of it. In the course of trying many cases, this writer feels warranted in stating that she has seen many able attorneys who rarely move for the production of the statements of witnesses who are on the stand. There are others who occasionally ask for such statements and there are those from whom the government can almost always expect a

demand. An obvious disadvantage to be faced is in a case where there might be no substantial material in the statements which can be used for impeachment. Many attorneys no doubt feel that in the eyes of the jury this disadvantage outweighs any small conflicts which may appear from an examination of the report.

Similarly, present counsel alleges that the fact that Attorney Sweeney did not make a motion to acquit at the close of the case is an "evidence" of incompetence. However, again there is no explanation as to how this fact could be related to the grounds which were presented as a basis for the continuance, in view of Sweeney's overall vigorous and skillful representation. Anyway, we are dealing in this appeal with the appellants right to a fair *trial*. If it could be said that the failure to make a motion to acquit at the *close* of the case was *per se* an indication of incompetence, it had nothing to do with the verdict of the jury. The only basis for making a motion here would have been to preserve the question of the sufficiency of the evidence before this appellate court. Further, the fact that a motion to acquit at the close of the case was not made, would not disallow the defendant's appeal on other grounds. It may well have been that, after having argued the original motion for judgment of acquittal before the court, and having received an unfavorable ruling, and, realizing that the weight of the government's evidence was such, the appellate court not having within its province the weighing of credibility of witnesses, as to support an adverse verdict on appeal, Sweeney believed there was no point in making a motion for judgment of acquittal. This matter, again, was entirely within the judgment of the attorney to decide which way to act.

The remaining few matters mentioned by appellant's counsel as such "evidences" are set forth briefly. With respect to Item (d) it contains a gross misstatement of an alleged government claim. Further it involves a voluntary statement by the defendant on cross examination as follows:

"Q. Where did you meet him? A. I knew him during the bootlegging days. I have known Mr.—his name was Jimmy Byrnes—I didn't know him by Jimmy Birddog but he was the same gentleman."
[Rep. Tr. 456.]

It is obvious that the government did not claim that the defendant was a bootlegger in prohibition days. At that point the court asked the defendant a couple of questions with respect to the latter's voluntary statement that he had known the above person in the bootleg days. Thus, not only was this testimony of no particular significance in the trial of the law suit, but it was opened up by the defendant's own statement. The questions asked by the court pursued the subject to very little extent and the matter was closed and not mentioned again after that time.

Item (e) at Page 23 of appellant's opening brief contains still another misstatement as to the record of the case. The government did not claim that appellant was engaged in making horse racing bets. An examination of the transcript [Rep. Tr. 460-462] shows the testimony involved related to alleged bookmaking activities of the appellant's *brother*. Also Attorney Sweeney did not fail to object to the questions asked by government counsel with respect to this subject, but *did* object to the materiality of this line of questioning. [Rep. Tr. 461.] As a

matter of fact, in ruling on the objection, the court stated

“So it was brought out on direct. I do not see the materiality of it either way, but you opened it up and she has a right to cross examine on it.

The witness is not charged with making book or betting on horses or knowing his brother or having a brother who does.

Mrs. Bulgrin: Yes. That wasn't my point at all. If I may ask one more question of this subject I will leave it.”

Thus, not only is Item (e) completely inaccurate but the government used the subject matter involved in a legitimate argument to the jury. [Rep. Tr. 542-545.]

Appellant claims that Attorney Sweeney failed to object to questions with respect to defendant's income and sources of income, but it is clear that the questions involved a subject which was opened up on direct examination of the defendant. The defendant testified that in 1956 and 1957 his business or occupation was that only of a used car salesman. Also appellant had testified as to the trip that he made back to New York with Evelyn Stein and her daughter. Thus the inquiry as to his occupation and to the amount of money which he realized from it appeared to be a legitimate subject for cross examination. Since the subject reasonably appeared to have been opened on direct examination of his own client, it was not absolutely incumbent on Attorney Sweeney to object to questions which were in the same field and its related aspects.

It is further alleged that another “evidence” of Mr. Sweeney's incompetence was that he failed to object

that the court's remarks with respect to a prior conviction were "too broad and prejudicial." [Rep. Tr. 452.] In view of the state of the law on this subject, it can hardly be said that the fact Mr. Sweeney did not object to the court's remarks was a mark of incompetence on his part at all. It should be kept in mind that later during the instruction conference, the court advised counsel that he was going to give instruction 23-B. [Rep. Tr. 511.] This is shown by the record to be the effect of evidence proving the prior conviction of a felony of a witness and its limitation to the question of credibility. [Clk. Tr. 48.] During the court's instructions, the jury was told that "evidence of a defendant's previous conviction of a felony is to be considered by you *only* in so far as it affects the credibility of the defendant as a witness, and must not be considered as evidence of guilt of the offense for which the defendant is on trial." [Rep. Tr. 612.] Thus, the jury was clearly instructed properly on the purpose for which the government offered evidence of prior convictions.

Further, the cases show that evidence of prior offenses is admissible for certain purposes in addition to impeachment. In appellant's own prior case reported at 166 F. 2d 851 (9th Cir., 1948), *Stein v. United States*, Judge Orr of this court stated:

"It is urged such testimony disclosed the commission of a separate and distinct crime but appellant's argument fails to take into consideration the exceptions which permit the introduction of such evidence when its purpose is to show a system, guilty knowledge, etc."

In *United States v. Richman*, 57 Fed. Supp. 903 (D. C., W. Va. 1944) the trial court had declined to limit the defendant's admission of a prior conviction to the extent that it might affect his credibility. The judge advised the jury that it could be considered as evidence of a tendency or pre-disposition on the part of the defendant to violate the law involved in the trial. The Appellate Court reversed, quoting the rule that a conviction cannot be received simply to prove the commission of the offense on trial. However, the court stated:

"The only exceptions to this rule which I have been able to find relate to similar offenses committed at or about the same time, which may be admitted on the question of intent, purpose, design, knowledge, motive or system."

In *Caldwell v. United States*, 78 F. 2d 282 (4th Cir., 1935) the court held that proof in the government's case of a prior conviction of the defendant 10 years previously for a similar offense to the one on trial was error, but this holding was made *only* on the ground that it was too *remote* under the circumstances of the case. The court said:

" . . . it is well settled that evidence of similar transactions may be admissible, under certain circumstances, as bearing upon the question of intent, purpose, design, or knowledge"

Thus, again, it cannot be said that the fact that Mr. Sweeney did not object during the press of trial on such a matter would be any evidence of incompetence.

It is apparent that the present counsel for appellant has ignored the workmanlike quality of Mr. Sweeney's defense as a whole. It is obvious from a reading of the

transcript that Mr. Sweeney was well prepared to go to trial and gave appellant spirited, alert and skillful representation. He clearly did not pull his punches in giving appellant his day in court and did not let down in his representation at all.

Somewhat in the wording of the *Glasser* case, 315 U. S. 60 the government contends that present counsel for appellant is indulging in "nice calculations" as to the manner in which Mr. Sweeney represented appellant. However, our "examination of the record leads to the conclusion" Mr. Sweeney's representation of appellant was as effective as it could have been had he not been involved in the State Court incident.

(2) No Error Was Committed in Connection With the Motion for New Trial.

Rule 33 of the Federal Rules of Criminal Procedure sets forth that: "a motion for a new trial based on any other grounds shall be made *within* five days after verdict or finding of guilty . . ." In other words, it is obvious that the only requirement involved in the Rule is that the motion be made *within* the five day period and cannot be made *after* the five day period, unless the court fixes a further time during the five days. There is no provision a defendant shall have the entire five days within which to prepare his motion. It is not unreasonable for a court to fix an earlier time for the making of the motion for new trial, particularly when it appears that the court will be absent from the district for a period of time which would make it impossible to hear the motion until after the evidence would begin to fade from memory. Further, Mr. Sweeney himself suggested that the motion would have to be argued the next day.

It has been held that in absence of an abuse of discretion, an order denying a motion for new trial will not be disturbed on appeal

Fryer v. United States (1953), 207 F. 2d 134, *cert. den.*, 346 U. S. 885.

(3) The Verdict of the Jury Should Be Upheld.

Another question still preserved to appellant at this stage of the proceedings, is whether a gross miscarriage of justice has resulted, although there was no motion for judgment of acquittal made at the end of the government's case. All of the testimony must be considered in that inquiry in the light most favorable to the government.

Small v. United States, 255 F. 2d 604;

Picciurro v. United States, 250 F. 2d 585;

Knight v. United States, 213 F. 2d 699;

Corbin v. United States, 253 F. 2d 646.

It is also to be noted that the appellant was sentenced to 20 years on Count One and to 20 years on Count Three, the sentences on these two counts to run concurrently. If the sentence on either count is valid, there should be an affirmance.

Jaynes v. United States, 224 F. 2d 367 (9th Cir., 1955);

Ward v. United States, 183 F. 2d 270, *cert. den.*, 340 U. S. 864 (10th Cir., 1950).

Initially, it is not thus felt that it is necessary to discuss the ramifications of the evidence on the conspiracy count. However, the government does submit to the court that the entire verdict should stand, especially when considered under the narrow restrictions applicable at this time.

Since an agreement to do an act is distinct from the act itself and overt acts may be charged and proved as substantive offenses, it is felt that it is only necessary to comment upon Count Three of the Indictment in considering whether the first 20 year sentence should be upheld.

Pinkerton v. United States, 328 U. S. 640, 643;

Kobey v. United States, 208 F. 2d 583, 595, 596 (9th Cir., 1953).

It is hardly necessary to repeat the testimony that Browning gave which has heretofore been related in the statement of the case, but it is to be noted that Browning and appellant pooled their resources of \$7000 for a kilo of heroin, which they decided to distribute together. When Stein came back from New York he had a kilo of "merchandise" with him in glassine bags. Browning testified that when he used the word "merchandise" he was talking about heroin. The two men then proceeded to "cut" one quarter of the kilo with milk sugar. Appellant told Browning that he wanted to cut it a little further because he didn't think that the people were entitled to that particular grade of "merchandise" for the price they had agreed to sell it for. All the dealings that appellant had with Browning showed that appellant was treating the substance as heroin. In fact he told Browning that it would test out close to 90% pure heroin. In addition, Browning testified that when he and Stein were cutting it, each personally used a little of the narcotic. Appellant and Browning discussed letting Clarence Winfrey have some of the "merchandise" and agreed to let him have one ounce for \$350. At that particular time Browning also told appellant that he had a fellow who wanted

ten “pieces” of “stuff.” Browning testified that a “piece” meant an ounce and “stuff” meant heroin. The very next day Browning saw Winfrey and took three “pieces” of “merchandise” to him for which Winfrey paid \$350 in cash, and owed \$700 on consignment. This was a quantity of heroin which was from the kilo of heroin that appellant had bought for \$7000. Right after the time that Winfrey received the three ounces of heroin from Browning, appellant and Browning went over to Winfrey’s house. Not too long after that time, according to Winfrey’s testimony, Winfrey told appellant that he had something for “Duke” and Stein told Winfrey that he, Stein, would pick it up. They made arrangements to meet at Bronson and Washington. Fred Stein showed up with his brother, Bernie Stein, and Winfrey testified that he believed he gave the \$700 to Fred Stein. However, it is obvious that if he had handed it to Bernie Stein it was merely for convenience and that the money got to Fred Stein.

Regardless of the appellant’s denial of the testimony given by Browning and the Winfreys, the fact remains that the evidence was more than sufficient to support the verdict of guilty on Count Three of the Indictment which charges the facilitation of sale. It is clear that no gross miscarriage of justice occurred by the verdict of guilty on that count. The same is true with respect to Counts Four, Five and Six. Present counsel for appellant claims with respect to each of these counts that, in effect, there is not a word of testimony as to what the “merchandise” consisted of. However, the testimony is full of references to the language which was used by the parties involved to refer to heroin. A further indication of the fact that Fred Stein was dealing with heroin, aside from the prices

which were charged, the direct testimony as to the language used which referred to heroin and the other circumstances was the fact that Celeste Winfrey testified that she sold Matthew Beard a quantity of heroin from some *that she had obtained from appellant* shortly before that time. This quantity of heroin was in evidence at the trial and a stipulation was entered into that, in effect, it was indeed heroin.

Counsel claims that appellant was convicted solely on the testimony of Browning and the Winfreys. This testimony, if believed by the jury, would have been sufficient alone to have convicted the appellant. However it is to be noted that the testimony of the agents as to the devious nature of the dealings which appellant had with the Winfreys and with Browning late in the game corroborates the fact that he was engaged in the illicit traffic of narcotics. This is true although attempts to purchase narcotics from him under supervision did not materialize in the actual acquisition of heroin. It is not difficult to infer that Stein was fearful of making any further sales to them because he had heard of their arrests.

The appellant also offered some corroboration through his own testimony, not only through his admissions that he was acquainted with the Winfreys and with Browning and that he had met them on many of the occasions which they testified to, but also in that he testified that he did have certain discussions about narcotics with the Winfreys and with Browning.

At any event, much of appellant's argument only deals with the questions of the credibility of the witnesses which were questions for the jury. There are several mis-state-

ments made, such as the Federal officers who arrested Browning evidently promised him immunity if he would act as an informer, and that Browning selected Stein as a likely prospect upon whom to lodge the “blame” and went to work with Clarence Winfrey to accomplish his purpose, making “deals” with him and his wife. The record clearly shows them to be untrue.

Counsel for appellant has set forth certain specifications of alleged error at pages 26 to and including page 30 of the opening brief. However it is felt that these items, which are not again discussed or explained in any way in the opening brief, and appear to have been thus waived, have either been treated above or are not worthy of further consideration.

See:

Rule 18 (d), (e), Rules of Court of Appeals,
Ninth Circuit;

Utley v. United States, 115 F. 2d 117 at 118 (9th
Cir., 1940);

Watts v. United States, 220 F. 2d 483 (10th Cir.,
1955).

In the case of *Tincher v. United States*, 11 F. 2d 18 (4th Cir., 1926) the appellant raised the “unsound” point that the sentences constituted cruel and unusual punishment. However the Court held that the sentences imposed were within the limit prescribed by statute and it is well settled that it would not be reviewed on appeal, except in the case of gross or palpable abuse.

There was certainly no abuse in sentencing the appellant to a total of 50 years. The evidence in the case, showed

that he had been dealing extensively with large quantities of heroin purely for monetary gain. Further the defendant had been convicted on three previous occasions of offenses involving narcotics. Judge Hall was entirely justified in imposing a sentence which would isolate him from the society upon which he had inflicted for so many years the results of his extensive and illicit traffic in narcotic drugs.

It is submitted the Judgment should be affirmed.

Respectfully submitted,

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No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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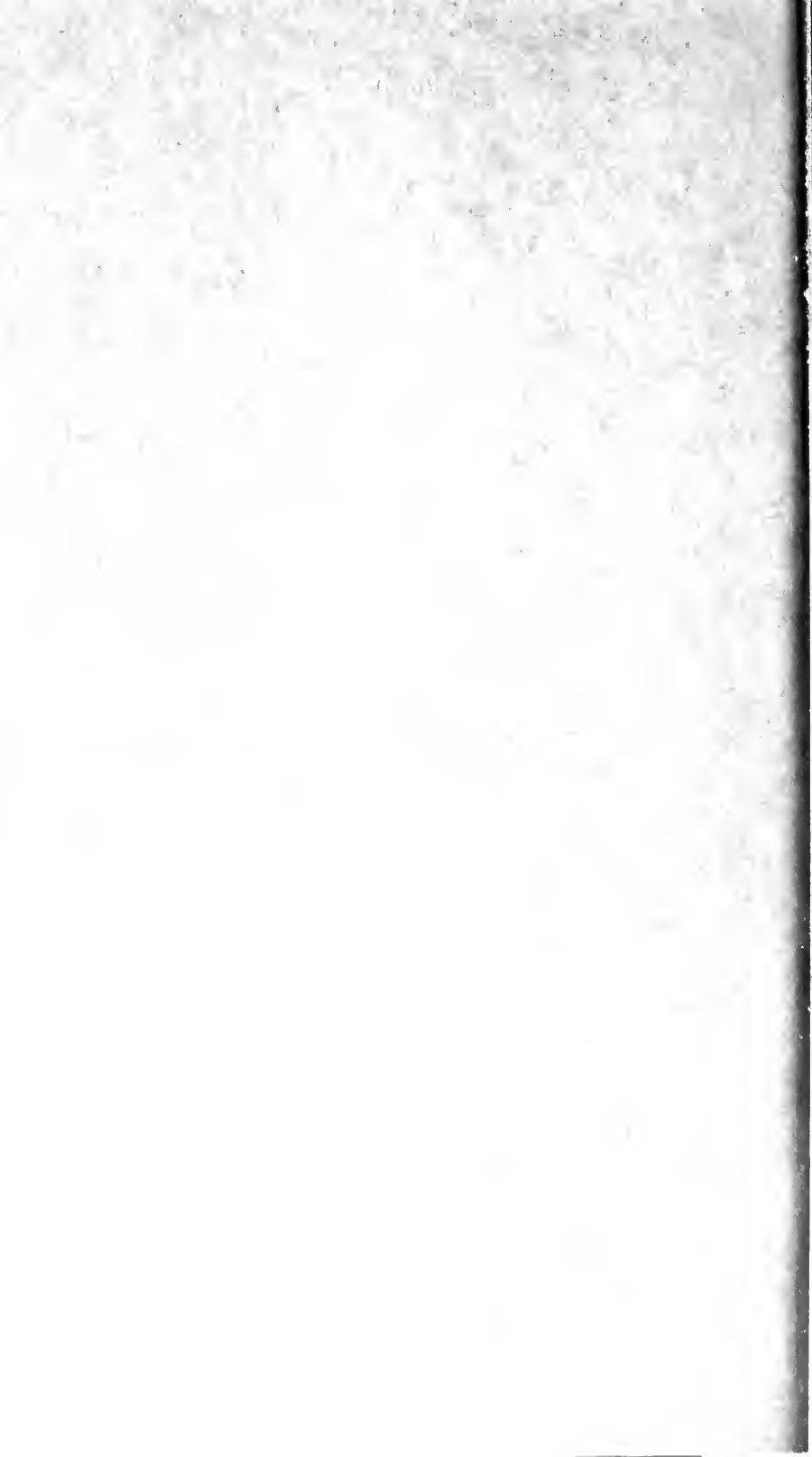
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No. 16309

IN THE

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APPELLANT'S REPLY BRIEF.

I.

**The General Tenor of Appellee's Brief as Affected by
the Recent Decision of This Court in Reynolds
v. United States.**

Counsel for appellant respectfully state that appellee has made no attempt to answer the main points set out in appellant's brief. As an example, only one of the 15 cases, cited and relied upon by appellant in his brief, is referred to in appellee's brief and that reference is an indirect one. The indirect reference appears on page 58 of appellee's brief, where one of the principal cases relied upon by appellant, *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, is cited to the point that appellant indulged in his brief in "nice calculations" in presenting attorney Sweeney's incompetence at the trial. Counsel for appellee takes the phrase, "nice calculations," from a statement in

the opinion of the Supreme Court in the *Glasser* case. The phrase, *nice calculations*, as used in the *Glasser* case, militates strongly against the Government here, as shown by the full quotation:

“The right to have the assistance of counsel is too fundamental and absolute to allow courts¹ to indulge in *nice calculations* as to the amount of prejudice arising from its denial.” (315 U. S. 76, 62 S. Ct. 467.)

Counsel for appellee, in effect, concede that attorney Sweeney’s representation of the defendant was inadequate by saying on page 58 of appellee’s brief that Sweeney’s representation of appellant would have been effective “*had he not been involved in the state court incident.*” Whatever *nice calculations* have been made cannot be laid at appellant’s door because appellant has not presented any. On the contrary, appellee’s counsel have consumed 20 pages (Appellee’s Brief, pp. 38-58) where they indulge only in *nice calculations* in the endeavor to present in appellee’s brief the very points which the Supreme Court has said in the *Glasser* case cannot be *indulged in by courts to determine the amount of prejudice arising out of the denial by a court of the effective assistance of counsel.*

The mere perusal of the substantial and damaging evidence of the acts of omission and commission of attorney Sweeney (Appellant’s Brief, Point III, pp. 46-50) at the trial will establish that it is the appellee who has indulged in *nice calculations* to avoid the effect of attorney Sweeney’s inadequate defense of appellant.

¹All emphasis ours unless otherwise specified.

Although the indictment charges the defendant with a violation of Section 371 of Title 18, U. S. C., the conspiracy section, in Count One of the indictment, the Government now admits that the charge was an error and that it was intended by the Government that the five counts in the indictment on which the appellant was convicted, including the conspiracy count, were brought under Section 174 of Title 21, U. S. C. (Appellee's Brief, p. 2.) Appellee contends that the doubt as to which section under which the conspiracy count was brought was resolved by the discussion in chambers reported on pages 511 to 512 of the reporter's transcript. There, the Court expressed a doubt as to whether or not the conspiracy section or the narcotics section applied. The Court resolved the doubt in its own mind by reading Section 174, Title 21, U. S. C., to the jury. No mention was made of Section 371, Title 18, U. S. C. [Rep. Tr. p. 618, line 14, to p. 619, line 11.] This was prejudicial error in the instructions which, appellant believes, requires the reversal of his conviction on all five counts upon which he was convicted. If attorney Sweeney, as he apparently did, allowed the instruction to be given without protest, another item is added to the long list of Mr. Sweeney's inadequacies in the defense of the appellant. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*"

The case was tried on the theory that the plaintiff was charged with a conspiracy, under Section 371 of Title 18, U. S. C. At this late date, the Government cannot switch to Section 174 on Count One. The Government's switch shows that the *defendant was not informed of the nature and cause of the accusation against him*, as required by the Sixth Amendment, and that his conviction on the conspiracy count should be reversed, and along with the reversal of appellant's conviction on Count One, *it seems that his conviction on the four substantive counts should fall* as all of the overt acts charged in the conspiracy count have been translated into the substantive charges contained in the remaining five counts of the indictment. The insufficiency of the evidence to sustain the conviction of appellant on any one of the five counts of the indictment on which he was convicted is presented between pages 51-57 of appellant's brief.

Hallman v. United States (U. S. C. A. D. C., 1953), 208 F. 2d 825, 827.

The recent decision by this Court in *Reynolds v. United States*,² No. 16249, was handed down June 1, 1959, since appellee's brief was filed. Counsel for appellant believe that the *Reynolds* case furnishes a complete answer to appellee's brief. This is so because appellee's argument is devoted largely (Appellee's Brief, pp. 38-59) to an attempt to answer the point made in appellant's opening brief (pp. 34-50), *that appellant was not allowed to have counsel of his own choosing*, and that attorney Sweeney was, in effect, *forced upon him by the lower court*. Counsel for appellant feel that it is established by the record that appellant was denied the right under the Sixth Amendment

²Not yet reported.

to be defended by *counsel of his own choice* within the meaning of the decision in *Reynolds v. United States*, *supra*.

The *Reynolds* case, which we believe to be controlling here, stated the requirements of the Sixth Amendment as it applies to the representation of a defendant in a criminal case by *counsel of his own choosing* in the following language:

“The record is clear that appellant attempted to *dismiss his local counsel following the order of the district court refusing a continuance of the trial, which appellant sought in order to enable counsel from the mainland to represent him*. The record is further clear that the appellant sought to represent himself at the trial, but the district court refused him the right to do so and insisted upon appellant’s representation at the trial by the local counsel.

“In our view the district court erred, in the circumstances of this case, by denying appellant the right to conduct his own defense. As this Court, speaking through Judge James Alger Fee, stated in *Duke v. United States*, 255 F. 2d 721, at page 724 (certiorari denied 78 Sup. Ct. 1561): ‘*There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestioned right to defend himself. (Citing Title 28, U. S. C. A. Section 1654.) Second, an accused should never have counsel not of his choice forced upon him. (Citing Adams v. United States, 317 U. S. 269, 279.) This Court has never failed to recognize either of these fundamental rights.*’”

II.

Appellant's Fundamental Rights Were Violated When the Court Forced Him to Go to Trial With Attorney Sweeney as His Counsel.

The appellee seeks to meet this principle stated by Judge James Alger Fee in *Duke v. United States*, 255 F. 2d 721, 724, and adopted in *Reynolds v. United States*, *supra*, by relying upon the principle that ordinarily the granting of a continuance is within the sound discretion of the trial court, and that an abuse of that discretion must be shown in order to obtain a reversal. (Appellee's Brief, pp. 38-59.)

The circumstances under which the denial of appellant's motion for a continuance was had are such in this case that *the ordinary rule* requiring the showing of an abuse of discretion *does not apply*. That appellee is relying upon the ordinary rule is shown by the authorities it cites to support its main argument that there was no abuse of discretion in the denial of the motion for continuance. (Appellee's Brief, pp. 38-58.) That appellee has assumed such a posture is shown by the following cases from this Court, which are cited and relied upon by appellee:

In *Williams v. United States* (9 Cir., 1953), 203 F. 2d 85, cited at page 44 of appellee's brief, the court granted a continuance for 13 days because of the illness of counsel. At the conclusion of the 13 days, counsel's motion for another continuance was denied on the ground that it had not been shown that within that 13 days defendant had attempted to obtain substitute counsel. The attorney, though claiming to be ill, appeared at the time of trial and made a motion for another continuance, which was denied. Upon the denial of the continuance, the attorney conducted the defense in a vigorous and alert manner.

In *Hudson v. United States* (9 Cir., 1956), 238 F. 2d 167, cited at page 44 of appellee's brief, it does not appear from the opinion on what ground the motion for continuance was made, but apparently it was made for some other reason than that urged by appellant Stein, namely the right under the Sixth Amendment of a defendant to be *represented at the trial by counsel of his own choosing*.

In *Sherman v. United States* (9 Cir., 1957), 241 F. 2d 329, 337-38, cited at page 44 of appellee's brief, a motion for continuance on the ground that the defendant had not been given time to confer with his court-appointed attorney was denied because the record showed that the court appointed Mr. Kimball counsel for defendant on September 7, 1954, and that on September 17, 1954, 10 days later, when the case was called, defendant's counsel announced that he would be ready to go to trial on September 21. The case went to trial on September 21. The defendant raised on appeal that he had been denied due process of law guaranteed him by the Sixth Amendment, in that he was denied effective aid of counsel of his own choice. The motion was based upon the ground that defendant was deprived of the right to consult with his court-appointed counsel. The record failed to bear him out.

In *Thomas v. United States* (9 Cir., 1958), 252 F. 2d 182, cited on page 45 of appellee's brief, the question of a continuance was not involved. Shortly after resumption of trial following a noon recess, the attorney for defendant Thomas requested an early adjournment that afternoon on the ground that he was not feeling well. The trial proceeded until around 4:00 o'clock in the afternoon, when the prosecution rested. The attorney for the defendant said that he planned to call one or perhaps two

witnesses. The court replied that he wanted to hear the witnesses that afternoon. The attorney, Mr. Schultz, said that he would ask for a recess at that time for about 5 minutes to go to the restroom to relieve himself. The court suggested 15 or 20 minutes. The attorney asked for about 25 minutes to make his decision. Whereupon, 25 minutes recess was granted, after which the trial was resumed. Defendant made a second claim of error that the trial court erred in refusing to grant the motion for an early adjournment because more time was needed for counsel to prepare for the defense. The court held that in the circumstances shown by the record, the recess for the period suggested by the counsel for the defendant and the failure of the court to grant an adjournment at that stage of the trial to the next day to allow counsel to prepare the defense was not error.

The *Thomas* case is extensively quoted from at page 45 of appellee's brief. The quotation seems to us to answer the argument of appellant on the question of abuse of discretion in the denial of appellant Stein's motion for a continuance in order that he might have other counsel than Sweeney represent him. The part of the quotation from the *Thomas* case on page 45 of appellee's brief, to which we refer, is as follows:

"The case of *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 465, 86 L. Ed. 680, upon which appellant principally relies, bases its holding as to 'Assistance of Counsel' upon a showing that *some* prejudice resulted to the defendant by the appointment of one of his attorneys to represent one of his codefendants. It is from this basis that the Supreme Court in the *Glasser* case held that it was unnecessary for the defendant to show *exactly* wherein

he was prejudiced and that any interference with the defendant's right to effective assistance of counsel was sufficient to constitute a denial of effective assistance of counsel." (252 F. 2d, p. 183.) (Emphasis by Court.)

We do not feel that a discussion of the cases cited from other Circuits by appellee on this point is required. The principles are well covered by the cases from this Circuit, which have been distinguished above. Further, we rely upon the *Glasser* case, the *Thomas* case and the *Reynolds* case to show that the appellant Stein was denied the *effective assistance* of counsel in this case. The *Thomas* case holds, following the *Glasser* case, that it is unnecessary for a defendant to show *exactly wherein he was prejudiced* and that any interference with the defendant's right to effective assistance of counsel is *sufficient* to constitute a denial of *effective assistance of counsel*. These subjects are all fully discussed under Point I of Argument, pages 34-44 of appellant's opening brief, to which we refer, in the interest of brevity.

Appellee states at page 39, *et seq.*, of its brief, that appellant's opening brief is replete with statements which are not supported by the record. Two items are presented to support appellee's claim. The first is that the appellant included as an appendix to his brief two newspaper articles which contained stories of attorney Sweeney's arrest by state officials for peddling narcotics and for bribery in connection therewith; the second is the charge that appellant's statement that attorney Sweeney appeared at the opening of the trial for the sole purpose of getting a continuance is not mentioned in the record. We feel that we were justified in attaching the newspaper articles as an appendix to the brief, for the reasons which we stated

in footnote 5 on page 36 of appellant's brief. Attorney Sweeney based his motion on 3 grounds, the third one of which is important here.

Attorney Sweeney said in making his motion for continuance:

"Thirdly, there is a question of the recent publicity which I have received in this affair over on the state side *by my arrest* in this—what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

* * * * *

"I felt that because of the nature of this kind of charge and the publicity that this case might get, *it might materially affect any defense* that I might have as to *my action* if I were to be connected in any way to any sort of situation like that.

The Court: *That occurred several weeks ago?*

Mr. Sweeney: *It occurred two weeks ago.*" [Rep. Tr. p. 7, line 11, to p. 8, line 2.]

The above remark of the court that Sweeney's arrest by the state authorities *had occurred several weeks ago* shows that the Judge knew of the publicity which Sweeney mentioned as constituting the reason why Sweeney *was totally incapable, mentally and physically, of going on with the trial because the publicity in this case could materially affect his own defense to the state action.*

We contend now, as we did in our opening brief, that it was the duty of the Judge, under *Glasser v. United States*, 315 U. S. 60, 76, 62 S. Ct. 457, 467, and *Von Moltke v. Gillies*, 332 U. S. 708, 724, 68 S. Ct. 316, 323,

to have acted on his knowledge of the publicity or to have inquired in particularity of attorney Sweeney concerning it, after Sweeney had mentioned the matter of the publicity to the Court. The Court owed the duty to appellant to grant the continuance sought by appellant and not compel Sweeney to go on with the defense when it was plain to all from the record that Sweeney could not in the circumstances do justice to himself and to his client; and it was the duty of the Judge in such a case to grant a continuance on the grounds sought by Sweeney, or deny it only after a penetrating and comprehensive examination of all of the circumstances, including the newspaper publicity, under which an appellant was forced to accept Sweeney as his counsel. (Glasser v. United States, supra; Von Moltke v. Gillies, supra.)

The cases of *Glasser* and *Von Moltke* clearly make it the duty of the Judge to have inquired into what Sweeney meant by the publicity surrounding his arrest by the state authorities and whether or not he, Sweeney, could serve two masters at the trial, himself and his client, which, it is obvious from Sweeney's own statements, he could not do without injury to himself in his own defense of the state charges.

No reason appears from the record why Mr. Harry A. Weiss, the attorney of record for appellant, designated by praecipe signed by appellant and Mr. Weiss April 7, 1958, should not have been called into the case to defend appellant when Sweeney declared his fear of hurting himself by the defense of appellant at the trial. The Court directed the clerk to call Mr. Weiss and have him come into the court, otherwise, the Court said it would send the United States Marshal for Mr. Weiss. The Court afterwards relented and passed the matter by saying, "I

sort of have a feeling that Mr. Weiss is playing horse with the courts.” [Rep. Tr. pp. 67-68.]

The second statement which the appellee claims to be unsupported by the record is that there is nothing in the record to show that Mr. Sweeney was appearing for the sole purpose of making the motion for a continuance. At the outset of the trial, counsel approached the bench and Mr. Sweeney said:

“Your Honor, this is a motion to continue this matter, based on three reasons.”

Then followed the three reasons, the third of which is quoted above. [Rep. Tr. pp. 4-11.] During the progress of the discussion, when the Court said, “we will go to trial this morning,” Mr. Sweeney replied, *“I would like the record to indicate that I am totally, both mentally and physically, unable to go to trial.”* [Rep. Tr. pp. 9-10.] All of this adds up to the fact that Sweeney appeared solely for the purpose of obtaining the continuance so that appellant could get other counsel, as he, Sweeney, was both mentally and physically totally unable to go to trial that morning because of the fear that, *if he did defend the appellant, he would be serving two interests, those of himself first, and his client second.*

That the motion for new trial should have been granted upon the same grounds as those stated for the continuance is fully set forth in Point II of the Argument, Appellant’s Brief, pages 44-46. We also contend, under Point II of appellant’s brief, that appellant Stein was denied due process of law by forcing him to present his motion

for new trial within some 19 hours after he was convicted, when Rule 33 of the Federal Rules of Criminal Procedure gave him 5 days after the verdict within which to make the motion. The quotation on page 58 of appellee's brief, from Rule 33 of the Federal Rules of Criminal Procedure, that, "a motion for new trial based on any other ground shall be made within 5 days after verdict or finding of guilty . . .," is misleading unless the whole of Rule 33 is considered. Rule 33 is as follows:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. *A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.*"

The quotation as it stands in appellee's brief is misleading for two reasons. The phrase, *any other grounds*, refers to grounds other than newly discovered evidence on which a motion for new trial may be made within two years after final judgment. The motion here *was not made* on the ground of *newly discovered evidence*. [Tr. p. 68.] The main ground of the motion for new trial was that the Court erred in denying the appellant's motion for continuance in order for him to secure counsel

other than Sweeney. Appellant was denied due process of law and the equal protection of the laws by the courts forcing him to make his motion for new trial within 19 hours after the verdict of the jury was returned.

We respectfully contend that the judgment should be reversed.

Respectfully submitted,

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No. 16309

IN THE

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APPELLANT'S PETITION FOR REHEARING.

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DEC 16 1959

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Appellant did not, as the opinion erroneously states at page 7, claim that Mr. Sweeney was not a competent lawyer or that he lacked in education and training. What appellant did claim was that Mr. Sweeney was overpowered by his own troubles in the State court where he was charged with being a narcotics peddler and bribery in connection with being a narcotics peddler, which charges made him so fearful of his own safety that he could not properly protect Stein.....	9
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*To the Honorable, the United States Court of Appeals
for the Ninth Circuit, and to the Honorable Albert
Lee Stephens, to the Honorable John D. Martin, Sr.,
and to the Honorable William E. Orr, Judges of said
Court:*

I

Status of the Case.

Appellant Fred Stein petitions this Honorable Court for a rehearing of its decision rendered November 16, 1959, affirming a judgment convicting appellant on five counts of an indictment charging him in one count with a conspiracy between appellant and three "unindicted conspirators", Quentin Browning, Clarence Winfrey and Celeste Winfrey, in violation of 18 U. S. C., Section 371, to receive, sell and transport heroin and to facilitate the

receipt, sale and transportation of the drug; the remaining four counts of the indictment on which appellant was convicted charged him with the substantive offenses of sale, and the facilitation of the sale of certain quantities of heroin to the above named three "unindicted conspirators", in violation of 21 U. S. C., Section 174. The consecutive sentences given appellant add up to 50 years. Appellant is 54. The sentence is for life with no hope of parole. (26 U. S. C., Sec. 7237(d).)

II

Grounds for a Rehearing.

1. As stated at the inception of the opinion, the principal question for determination in this case is whether or not appellant Stein had the *effective assistance* of counsel guaranteed to him by the *Sixth Amendment* to the *United States Constitution*, which follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense.*" (Emphasis added.)

2. The ordinary rule that a continuance of a trial is within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of that discretion can be shown, has no application to this case where the motion for continuance was made by counsel, Mr. Sweeney, on the ground of his confessed mental and physi-

cal inability to give appellant an adequate defense while he was laboring under a charge in the state court of being a narcotic peddler. Thus, this Court's holding at pages 2 and 3 of the opinion that, "We find no abuse of discretion by the court in refusing the fourth application for a continuance", has no application to the case under the decision of *Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, and under the recent decisions of this court of *Audett v. United States* (C. A. 9, May 4, 1959), 265 F. 2d 837, and *Reynolds v. United States* (C. A. 9, June 1, 1959), 267 F. 2d 235.

3. The opinion (footnotes 1 and 2, Op. pp. 2-5) shows on its face that there was a conflict of interest between attorney Sweeney and appellant and that Mr. Sweeney did not press important points in the defense of appellant for fear that by urging those important points he might damage his own defense to charges pending against Mr. Sweeney in the state court of peddling narcotics and bribery of the arresting state officers. (Health & Safety Code of Cal., Sec. 11500; Penal Code of Cal., Secs. 67 and 67½.)

4. The opinion, page 7, shows on its face that Mr. Sweeney was remiss in his duty at the trial in not making a full disclosure to the trial court of his troubles in the state court and in that he did not require the Government to produce reports of the government witnesses as provided by 18 U. S. C., Section 3500(b) and *Jenks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007. Undoubtedly, if the trial court had required Mr. Sweeney to make a full disclosure of the circumstances surrounding the narcotic and bribery charges pending against him in the state court, the trial court would have granted the continuance in order for Stein to procure other counsel or

require Mr. Weiss, his only counsel of record at the time, to come in and try the case. A full disclosure would have shown that Mr. Sweeney could not try the case properly without antagonizing the officers who would probably be witnesses against him in the state court.

III.

There Was a Conflict of Interest Between Mr. Sweeney, the Attorney Who Defended the Appellant at the Trial, and Appellant, Within the Meaning of *Glasser v. United States*, Supra; *Audett v. United States*, Supra, and *Reynolds v. United States*, Supra.

It was Mr. Sweeney who moved for a continuance of the trial on the ground that he was not mentally and physically able to defend appellant adequately because of his mental and physical disability resulting from the publicity Mr. Sweeney had received in connection with his arrest on a narcotic and bribery charges by the state authorities. [Op. p. 2.] Right there, the conflict of interest appeared. (*Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457.)

This Court then proceeds to review Mr. Sweeney's mental and physical condition at the commencement of the trial in the light of subsequent events. [Op. p. 3.] After the trial court had denied attorney Sweeney's motion for a continuance and had begun to empanel the jury, it was brought to the court's attention that Mr. Weiss was the attorney of record for appellant. [Op. p. 3.] This Court [Op. pp. 4-5] then passes to the question of coercion, which it holds cannot be sustained because this Court is impressed with the fairness of the lower court in offering to have Mr. Weiss produced in court. This Court has here incorrectly stated the record. The

facts as shown by the record are that attorney Harry Weiss was the only attorney of record for appellant when the case was called for trial. Mr. Weiss was so designated by appellant in a praecipae signed by Mr. Weiss April 7, 1958. [Transcript p. 15.] Mr. Weiss never retired as attorney for appellant. He was never relieved by the court. Why he did not appear at the trial is best known to Mr. Weiss. Besides, it was shown that attorney Sherman, who appeared in the case on one or two occasions, and Sweeney, who tried the case, were actually attorneys engaged by Mr. Weiss to assist him in the case. [Footnotes 1 & 2, Op. pp. 2-6.]

The lower court did not offer to have Mr. Weiss produced in court when Mr. Sweeney announced that he was physically and mentally unable to go on with the trial of this narcotic case because of the publicity following his arrest and charges in the state court of being a narcotic peddler and bribe dispenser and because of his fear that the defense of appellant might prejudice him, Mr. Sweeney, in the defense of his own case in the state court.

In the circumstances of this case, we believe that we should invite this Court's attention to the fact that Mr. Sweeney has since been tried in the state court on charges of the sale and transportation of a narcotic, heroin, a violation of 11500 of the Health & Safety Code of California, and on a bribery charge in connection with the heroin sale, in violation of Sections 67 and 67½ of the Penal Code of California. He was convicted on all charges. Mr. Sweeney has appealed to the District Court of Appeal of California, Second Appellate District. The title of that pending appeal is *People of the State of California, plaintiff and respondent, v. Paul W. Sweeney, defendant and appellant*, 2nd Criminal No. 6824. Mr. Sweeney represents himself on his appeal.

This Court recognizes [Op. p. 6] the well established principle announced in *Glasser v United States*, *supra*, that if a conflict of interest was made to appear between Mr. Sweeney and the appellant, the conviction would be reversed without the court making a search of the record to determine whether or not Mr. Sweeney's representation of the appellant was adequate. It was said in *Coplon v. United States*, (U. S. C. A. D. C., 1951), 191 F. 2d 749, 760, that:

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. *No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel*, or any other element of due process of law without which he cannot be deprived of life or liberty." (Emphasis added.)

The principle has been recognized by this Court in the only cases we can find construing the subject, the most important recent ones being *Audett v. United States*, (C. A. 9, 1959), 265 F. 2d 837, and *Reynolds v. United States* (C. A. 9, 1959), 267 F. 2d 235.

In the *Audett* case, it was said at page 839 of the opinion:

"It has become axiomatic that, in the absence of intelligent waiver, the right to the assistance of counsel in criminal cases

'is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.'

And prejudice will be inferred from the denial of assistance of counsel."

In the *Reynolds* case, it was said at page 236 of the opinion:

“In our view the district court erred, in the circumstances of this case, by denying the appellant the right to conduct his own defense. As this Court, speaking through Judge James Alger Fee, stated in *Duke v. United States*, 9 Cir., 255 F. 2d 721, at page 724, certiorari denied 357 U. S. 920, 78 S. Ct. 1361, 2 L. Ed. 2d 1365:

*‘There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestioned right to defend himself. [Citing Title 28, U. S. C. A. Section 1654] Second, an accused should never have counsel not of his choice forced upon him. [Citing *Adams v. United States ex rel. McCann*, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268] This Court has never failed to recognize either of these fundamental rights.’” (Emphasis added.)*

IV.

The General Rule That an Order Denying a Motion for a Continuance Will Not Be Reversed Unless an Abuse of Discretion of the Trial Court Can Be Shown Has No Application to the Main Point in This Case Arising Under the Sixth Amendment to the Federal Constitution.

This Court based its decision affirming the judgment upon the following statement appearing on pages 2 and 3 of the Opinion:

“The ground most strenuously urged was the assertion by Mr. Sweeney that he was not mentally and physically able to adequately defend the appellant. In this connection, we quote the court proceed-

ings in note 1.¹ The alleged mental and physical disability was asserted to be the result of publicity Mr. Sweeney had received in connection with his arrest on a narcotics charge. *We find no abuse of discretion by the Court in refusing the fourth application for a continuance.*" (Emphasis added.)

We believe that the quotation at the beginning of footnote 1, page 2 of the Opinion shows as a matter of law that Mr. Sweeney by his own declaration could not give appellant the effective defense required by the Sixth Amendment. The colloquy referred to between Mr. Sweeney and the Court and quoted in foot note 1 is as follows:

1. "Mr. Sweeney: * * * Thirdly, there is a question of the recent publicity which I have received in this affair over on *the state side by my arrest on this—what was it, bribery, incident—that was widely covered by radio, television and the newspapers*, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

"Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

"I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

"The Court: That occurred several weeks ago?

"Mr. Sweeney: It occurred two weeks ago.

“The Court: It occurred long enough ago that some change in counsel should have been made by this time.” (Emphasis added.)

It was patently an abuse of the Court’s discretion to deny a reasonable continuance in those circumstances.

V.

Appellant Did Not, as the Opinion Erroneously States at Page 7, Claim That Mr. Sweeney Was Not a Competent Lawyer or That He Lacked in Education and Training. What Appellant Did Claim Was That Mr. Sweeney Was Overpowered by His Own Troubles in the State Court Where He Was Charged With Being a Narcotics Peddler and Bribery in Connection With Being a Narcotics Peddler, Which Charges Made Him So Fearful of His Own Safety That He Could Not Properly Protect Stein.

The opinion states at page 7 that:

“Appellant attempts to point out certain instances in which Mr. Sweeney was remiss in his duty. *Appellant says Sweeney must have been ignorant of Section 3500(b) of Title 18 U. S. C., or the case of Jenks v. U. S., 353 U. S. 657 (1957), because he did not demand the production of government witnesses’ pretrial statements. If he was ignorant of the right to make such a demand, it could not be because of his alleged frame of mind because of a pending indictment. It would have been due to a gap in his general education, which is not urged.*”

The foregoing statement from the Opinion is the opposite of what appellant contended. Appellant has not contended that Mr. Sweeney was ignorant of Section 3500(b)

or of the *Jenks* case. What appellant did contend on this subject is shown by the following excerpts from pages 47-48 of Appellants Brief:

“The production of the statements and reports of those witnesses, made prior to the trial, was the only sure way to develop, on cross examination of the government’s witnesses, the manipulations of the officers and the promises of the officers to Browning and to the two Winfreys of immunity from prosecution and all other important things to the defense in their testimony. The statements and reports would have been of the greatest value in the defense of the appellant, as he was convicted solely upon the testimony of the accomplices. *Nothing could have occurred, which could have demonstrated more clearly Sweeney’s incompetence, than the failure to demand the statements. It cannot be supposed that Sweeney was ignorant of Section 3500 or the case of Jenks v. United States (1957) 353 U. S. 657, 77 S. Ct. 1007.* Section 3500 is known by its popular name as the Jenks law. The section became effective in September, 1957, and was based on the *Jenks* decision. Due to the wise publicity following the *Jenks* decision and the adoption of Section 3500, a lawyer practicing criminal law, as Sweeney was, who did not know about the section and its several intendments would, in itself, be enough to demonstrate his incompetence to try a criminal case in the Federal Courts. There is no answer to Sweeney’s failure to take advantage of this vital element in the defense of appellant *other than the fact that the record indicates that he, himself, was involved in the narcotics racket and that he did not dare to ask for the reports, as the manipulations prior to the trial, in which he confessed*

he had indulged, would probably have exposed him as a member of the racket.

Under *Jenks v. United States, supra*, if Mr. Sweeney had demanded the reports and they had been refused, there was nothing the Government could have done but dismiss the indictment."

It is obvious from reading the proceedings quoted in footnotes 1 and 2, pages 2-5 of the Opinion, that the requirement of the Sixth Amendment was not met by the vaccination of Mr. Sweeney and Mr. Weiss in this case. Obviously Mr. Sweeney was trying to protect himself first, and Mr. Weiss second, with the appellant left in the unfortunate position of not knowing what to do or say. The Sixth Amendment was plainly violated when the court denied appellant's motion for a continuance to obtain other counsel in place of Mr. Weiss and Mr. Sweeney, and when the court in effect directed Mr. Sweeney over his objection to go ahead with the trial.

We believe that the decision is in direct conflict with the case of *Glasser, Kretske, Kaplan and Roth v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, which seems to be directly in point here. In that case, Glasser, Kretske, Kaplan and Roth were indicted. The four persons mentioned were found guilty upon an indictment charging them with conspiracy to defraud the United States. (18 U. S. C., Sec. 88.) The Court of Appeals affirmed the convictions. (116 F. 2d 690.) Glasser, Kretske and Roth petitioned the Supreme Court for certiorari, which was granted. Glasser and Kretske had been assistant United States Attorneys until a short time before the indictment was returned.

William Stewart was employed by Glasser to represent him and entered his appearance as Glasser's attorney. The

firm of Harrington and McDonald entered their appearance for Kretske. At the commencement of the trial, McDonald informed the Court that Kretske did not wish to be represented by him. The Court then asked Stewart if he could act as Kretske's attorney. Defendant Glasser, who was represented by Stewart, said he would like to have his own attorney represent him, alone. After a colloquy between counsel and the Court, the Court entered an order vacating the appointment of McDonald as attorney for Kretske, and appointed Stewart to represent him. Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial. At the conclusion of the trial, all of the defendants were convicted, and the Seventh Circuit affirmed. (116 F. 2d 690.) The Supreme Court granted certiorari.

Numerous grounds were urged in the Supreme Court for reversal. The Supreme Court affirmed the conviction of Kretske and Roth but reversed Glasser's conviction. Glasser's conviction was reversed solely upon the ground of the appointment by the Court of his counsel, Stewart, to represent Kretske. It is impossible to distinguish the *Glasser* case from the case involved. In the case involved, Sweeney did not want to be forced to trial as appellant's attorney because he feared it would hinder the defense of himself in the similar charge which he was then facing in the State Court. The Supreme Court reversed the *Glasser* case because there was some conflict in the defense by Stewart of both Glasser and Kretske. On the face of things, it is clear that Sweeney was faced with a much more serious problem as he, himself, was involved personally. It is too much to expect of human nature that an attorney would do his best in a criminal case to defend his client, where a vigorous defense of the client would have the effect of embarrassing the at-

torney in the defense of himself on a similar charge. Reversing the conviction of Glasser. The Supreme Court said:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575; Tumey v. Ohio, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; Patton v. United States, 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see McCandless v. United States, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's

usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. *We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment.* This error requires that the verdict be set aside and a new trial ordered as to Glasser." (315 U. S. pp. 75, 76; 62 S. Ct. pp. 467-468.) (Emphasis added.)

VI.

Appellant Suggests in Accord With Rule 23 of This Court, That a Rehearing Should Be Granted and That the Case Should Be Reheard En Banc.

The suggestion is made because of the novelty of the main question presented, that of an attorney being unable to give a defendant effective assistance in a criminal case in a federal court because the attorney himself was laboring under similar charges in a state court, namely, the sale, transportation and possession of a narcotic. The rule is well established by *Glasser v. United States, supra*, that any conflict of interest between two or more defendants whom an attorney represents in a criminal case will destroy the effective assistance of counsel required by the *Sixth Amendment*. The principle of the *Glasser* decision has been recognized by other panels of this court in the recent cases of *Audett v. United States* (C. A. 9, May 4, 1959), 265 F. 2d 837, 839, and *Reynolds v. United States* (C. A. 9, June 1, 1959), 267 F. 2d 235, 236. So far as counsel for appellant have been able to determine this is a case of first impression where the conflict of interests arises out of an attorney's indictment

in the state court on charges similar to those on which he is defending a client in a federal court.

Counsel for appellant earnestly contend that no attorney should be allowed to defend in a federal court a person who is charged with a narcotics offense under the federal laws when the attorney himself is at the same moment laboring under a narcotic indictment in a state court.

After defendant's motion for a continuance had been denied, Mr. Sweeney announced to the court as shown in Footnote 1 page 2 of the Opinion that:

“Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial.”

This court then goes on to say on page 3 of the Opinion that:

“As to the question of whether Mr. Sweeney was in fact in a mental and physical condition to represent appellant, we as a reviewing court are privileged to view the question in the light of events subsequent to the ruling, which will be more fully developed later.”

The extensive quotation from the proceedings in Footnote 2, pages 3, 4 and 5 of the Opinion, does not touch upon the question of conflict of interest. All of the proceedings quoted in Footnote 2 relate solely to who, at the time, was actually the attorney for appellant. We have already shown above that Mr. Weiss was the attorney for appellant designated as such by precipe. The court in effect compelled appellant to sign the precipe designating Mr. Sweeney as his counsel for the trial. It is so shown by the colloquy found in Footnote 2, pages 3 and 4 of the

Opinion, which took place between the court and appellant and is as follows:

"The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

"The Defendant: (Pause)

"The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

"The Defendant: Yes.

"The Court: You do or do not?

"The Defendant: I will sign it."

What else could this hard pressed defendant do than sign the precipe when it was presented to him by the court in the circumstances shown by the above quotation? We contend that this quotation brings this case squarely within the ruling in *Glasser v. United States, supra*. This court says at page 6 of the Opinion:

"We are left with the conviction that the sole purpose of injecting the alleged inability of Mr. Sweeney to conduct the trial was to secure a continuance."

It should be borne in mind that Mr. Sweeney was the one who injected his inability arising out of the conflict between his own defense in the state court and that of the appellant in the federal court. The appellant said nothing except when he was questioned directly by the court. Under the *Glasser* case it does not matter what the purpose of Sweeney may have been. The mere statement by him to the court of the fact that he was unable to go ahead with the defense of Stein because it would probably injure him in his defense of the charges against him in the state court was enough to establish the conflict without more.

Appellant respectfully contends that his petition for rehearing should be granted and that the case should be reheard in *banc*.

Respectfully submitted,

WM. H. NEBLETT,

E. W. MILLER,

Counsel for Appellant.

Certificate of Counsel.

Wm. H. Neblett, one of counsel for appellant, certifies that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

WM. H. NEBLETT.



No. 16311 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PATRICK MILLARD EDDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 16311
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PATRICK MILLARD EDDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Jurisdictional Statement.

This case originally arose by reason of offenses committed in the year 1947 in violation of Title 18, U. S. C., Section 320, 1946 ed. (Mar. 4, 1909, chap. 321, Sec. 197, 35 Stat. 1126; Aug. 26, 1935, chap. 694, 49 Stat. 867), and Title 18, U. S. C., Section 408, 1946 ed. (Oct. 29, 1919, chap. 89, Secs. 1-5, 41 Stat. 324). The jurisdiction of the District Court was originally founded upon Title 18, U. S. C., Section 541, 1946 ed. (Mar. 4, 1909, chap. 321, Sec. 304, 35 Stat. 1153; Mar. 3, 1911, chap. 231, Sec. 291, 36 Stat. 1167); Title 26, U. S. C., Section 103, 1946 ed. (Mar. 3, 1911, chap. 231, Sec. 42, 36 Stat. 1100), and Title 18, U. S. C., Section 408, 1946 ed., *supra*.

Appellant thereafter made a motion presumably under Title 26, U. S. C., Section 2255 (June 25, 1948, chap. 646, 62 Stat. 967, amended May 24, 1949, chap. 139, Section 114, 63 Stat. 105).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C., Section 1291 (June 25, 1948, chap. 646, 62 Stat. 929), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. (as amended Dec. 27, 1948, effective Jan. 1, 1949 and April 12, 1954, effective July 1, 1954).

Statement of the Case.

On January 19, 1948, appellant was arraigned in Case No. 19743 upon an indictment charging robbery of a post office clerk under the aggravating circumstances of having put in jeopardy the life of the clerk by the use of a dangerous weapon, namely, a revolver, in violation of former Section 320 of Title 18, U. S. C. On that date appellant entered a plea of not guilty before the Honorable J. F. T. O'Connor. The court appointed Mr. Sidney A. Cherniss, Sr., an able and experienced criminal lawyer, to defend the appellant. On February 2, 1948 the case again came on before Judge O'Connor at which time a motion by counsel for appellant to withdraw the plea of not guilty in Case No. 19743 was granted and appellant thereafter entered a plea of guilty to the indictment. At the same time, appellant was arraigned in case No. 19801 on an indictment charging him with having transported an automobile from Los Angeles, California, to St. Louis, Missouri, in violation of former Section 408 of Title 18, U. S. C., to

which charge appellant pleaded guilty. No pre-sentence investigation being necessary, Judge O'Connor on the same date sentenced appellant to the mandatory term of 25 years for the robbery offense and to five years on the National Motor Vehicle Theft Act violation. The sentences were made to run concurrently.

On May 7, 1956, appellant filed a motion for a copy of the transcript of the record of proceedings in Cases Nos. 19743 and 19801, such transcripts to be provided at no cost to the appellant. By order of the same date, Judge Yankwich denied the motion, and on May 28, 1956 a notice of appeal from Judge Yankwich's order was filed. No further action was taken in the matter, and on August 13, 1956 the United States moved for a dismissal of the appeal, which was granted on August 14, 1956. The mandate dismissing the appeal from the order of May 7, 1956 was filed on September 6, 1956.

On September 4, 1956 appellant filed a motion for an order requiring the preparation of a transcript of the proceedings at his arraignment and sentence, such transcript to be prepared at the expense of appellant. This motion prompted a letter from the Office of the Clerk of the District Court for the Southern District of California to appellant advising that the reporter's notes concerning the proceedings in Cases 19743 and 19801 for January 19 and February 2, 1948 could not be located, this letter being dated September 13, 1956. Appellant interpreted the letter of September 13, 1956 as indicating that his motion filed on September 4, 1956 had been denied. On October 3,

1956 a notice of appeal from the purported denial of the motion of September 4, 1956 was filed. This appeal was not prosecuted, and on April 29, 1957 the United States moved this Honorable Court to dismiss the appeal of October 3, 1956, and the appeal was dismissed. When it became known that the motion of September 4, 1956 had not been presented to the court, the matter was brought before Chief Judge Yankwich. By order dated February 20, 1957 Judge Yankwich denied the motion of September 4, 1956. Appellant appealed said order to this Court, and on February 7, 1958 the order was affirmed, *Eddy v. United States* (9 Cir., 1958), 256 F. 2d 78.

On November 21, 1958, the appellant filed a petition for a Writ of Error *Coram Nobis* pursuant to Section 1651(a) of Title 28, United States Code. By order of the same date, Judge Yankwich denied the petition for the reason that the allegations set forth no grounds for relief and ordered the clerk not to set the matter for hearing. On December 1, 1958, appellant filed a notice of appeal from Judge Yankwich's order. The appellant's brief was filed on January 17, 1959. Appellant has confined his appeal to that portion of Judge Yankwich's order which specifically directs the Clerk of the Court not to set the motion for hearing.

ARGUMENT.

I.

Though Labeled an Application for Writ of Error Coram Nobis, Appellant's Petition Is in Fact a Motion Under Section 2255 of Title 28, United States Code.

The appellant contends, under the authority of *United States v. Morgan* (1953), 346 U. S. 502, that his petition is an Application for Writ of Error *Coram Nobis*. In that case, the only question presented was whether the United States District Court had the power to vacate its judgment of conviction and sentence after the expiration of the full term of sentence. In such a situation, a proceeding under Section 2255 is not available to the petitioner as he is no longer a "prisoner in custody" within the meaning of that section. The Supreme Court merely held that Section 2255 was not a bar to *coram nobis* and that, where no other remedy was available and circumstances compelled such action to achieve justice, a motion for this extraordinary writ must be heard by the federal trial court.

Here the appellant has neither fully served nor yet begun to serve the sentence which he attacks. Rather, he is in custody under such sentence, and to hold *coram nobis* available under these circumstances would be to destroy the purpose of Section 2255.

Madigan v. Wells (9 Cir., 1955), 224 F. 2d 577, 578, footnote 2.

II.

**Appellant Is Not Entitled to a Hearing Where the
Petition Does Not Present an Issue of Fact
Which, if Established, Shows the Denial of a
Constitutional Right.**

The appellant's only contention on this appeal is that Judge Yankwich erred in not ordering a hearing concerning the allegations in his petition.

Section 2255 of Title 28, United States Code, states in pertinent part that:

“ . . . unless the motion and the files and records of the case conclusively show petitioner is entitled to no relief, the court . . . shall grant a prompt hearing,”

As stated in *Barker v. United States* (10 Cir., 1955), 227 F. 2d 431, 432:

“It is clear from the reading of Section 2255, as well as from the decisions, that a petitioner thereunder is not entitled to a formal hearing, to be present, and to offer testimony, unless the petition presents an issue of fact, which, if established, shows a denial of constitutional rights.”

See:

Moore v. United States (C. A. D. C., 1957), 249 F. 2d 504.

The only issue for this Court's consideration is whether the allegations in appellant's petition show a denial of constitutional rights. The facts set forth in appellant's petition do not justify the relief requested, and thus the denial of the petition without a hearing was proper.

A. The Statement of the Trial Judge Regarding the Possibility of Parole in No Way Infringed Upon Appellant's Constitutional Rights.

Appellant alleges that prior to the entering of his plea the trial judge stated that appellant would be paroled upon good behavior after one-third of his sentence had been served. Assuming such statement was made, it constituted no more than a correct recital of the law as to when a federal prisoner becomes eligible for parole. (Sec. 714, Tit. 18, U. S. C., now Sec. 4202, Tit. 18, U. S. C.)

The appellant contends that he has served one-third of the sentence imposed and has not been paroled although his behavior has been good. A complaint that the Board of Parole has failed or refused to consider the appellant eligible for parole is not a ground for relief under Section 2255.

United States v. Walker (S. D. N. Y., 1953), 117 Fed. Supp. 502.

B. Appellant's Assertion of Innocence Is Not Sufficient to Require a Hearing.

In order to justify a hearing on a petition under Section 2255 there must be a substantial issue of fact. (*United States v. Hayman* (1952), 342 U. S. 205, 223.) The petition must, therefore, set forth facts, as distinguished from mere conclusions, upon which a right to relief is predicated. In the absence of such facts in the petition, the trial court must deny the motion without a hearing.

Taylor v. United States (8 Cir., 1956), 229 F. 2d 862;

United States v. Strum (7 Cir., 1950), 180 F. 2d 413;

United States v. Cope (W. D. Mo., 1956), 144 Fed. Supp. 799.

In his petition the appellant states that although he pleaded guilty to the charge in the Indictment he is, in fact and in law, innocent. This assertion is purely a conclusion, and thus warrants no consideration in the determination of whether a hearing should be granted.

United States v. Bradford (2 Cir., 1956), 238 F. 2d 395;

United States v. Code, supra.

As stated by Judge Swan in *United States v. Pisciotta* (2 Cir., 1952), 199 F. 2d 603, 606:

"If it were sufficient to allege merely conclusionary statements, such as, 'I am innocent but was induced to plead guilty against my wishes,' one can readily imagine how many convicts without valid complaint against these sentences would obtain an excursion from a distant penitentiary at government expense."

Quoted also in

Williams v. United States (9 Cir., 1957), No. 15,772, decided December 16, 1957, see 261 F. 2d 224.

C. Appellant's Plea of Guilty Did Not Deprive Him of His Constitutional Rights.

There is no allegation in the petition asserting or even suggesting that the appellant did not willingly and knowingly enter his plea of guilty to the facts set forth in the Indictment. Appellant merely claims that when he entered his plea he was laboring under a misapprehension as to the imposable sentence. This erroneous belief on the part of the appellant in no way affected the validity of his plea, for a misunderstanding as to possible sentence does not equate to a misunderstanding of the nature of the charge. (*Fed. Rules Crim. Proc.*, Rule 11.)

D. Appellant Was Afforded That Degree of Representation by Counsel Guaranteed Him Under the Constitution.

Appellant contends that his plea was entered as a result of ineffective and inadequate counsel.

The petition shows on its face that the charge of inadequate counsel is based solely on the fact that Mr. Cherniss advised the appellant that there was no minimum sentence for the offense charged and that if he changed his plea to guilty the court would sentence him to not more than five years' imprisonment.

Thus, the only erroneous advice given by counsel was in regard to the sentence imposable upon conviction. This is far different from the situation where counsel is derelict in his investigation of the facts or misleads his client on matters concerning the merits of the case.

See:

Kyle v. United States (9 Cir., 1959), No. 16,144, decided February 16, 1959.

It is obvious that appellant's real contention is that he received a sentence more severe than he anticipated. Appellant's complaints are peculiarly susceptible to the language of *United States ex rel. Swaggarty v. Knoch* (7 Cir., 1953), 245 F. 2d 229, 230, where the court, in affirming the denial of a similar petition without a hearing, stated:

"Appellant was undoubtedly surprised and disappointed by the severity of the sentence imposed upon him. The prediction of his counsel that he would fare better by entering a plea of guilty than if he stood trial seemed to him to be entirely unwarranted. As so often happens after the imposition of a severe sentence, a rash of petitions and motions follows."

See:

United States v. Page (2 Cir., 1955), 229 F. 2d 91;
Sweeden v. United States (8 Cir., 1954), 209 F. 2d
524.

The complaint is no more than an expression of appellant's opinion that he was not well represented. Under the circumstances it would have been absurd for the trial court to send for the petitioner and have him take the stand to restate the same opinion.

Generally it may be said that the Constitution does not guarantee that appointed counsel shall measure up to the notions or standards of ability or competency of the accused. It is enough that the trial court appoints a qualified attorney to represent the defendant and that the attorney appears, advises and represents the defendant at all stages of the proceedings. As this court stated in *Williams v. United States, supra*:

"The rule in such cases is that stated in *United States v. Wight*, 2 Cir., 176 F. 2d 376, 379, as follows: 'The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255.' "

See:

Latimer v. Cranor (9 Cir., 1954), 214 F. 2d 926,
929;

Sherman v. United States (9 Cir., 1957), 241 F.
2d 329;

Losieau v. United States (8 Cir., 1949), 177 F. 2d 919;

Moss v. Hunter (10 Cir., 1948), 167 F. 2d 683;

Diggs v. Welch (C. A. D. C., 1945), 148 F. 2d 667.

Conclusion.

Appellant's petition did not allege facts sufficient to show a denial of constitutional right, and thus Judge Yankwich's order of November 21, 1958 denying the petition and not setting the matter for hearing should be affirmed.

Respectfully submitted,

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No. 16314 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in bankruptcy of Cecil M. Jackson,
bankrupt,

Appellee.

BRIEF OF APPELLEE, A. S. MENICK, TRUSTEE FOR CECIL M. JACKSON, BANKRUPT.

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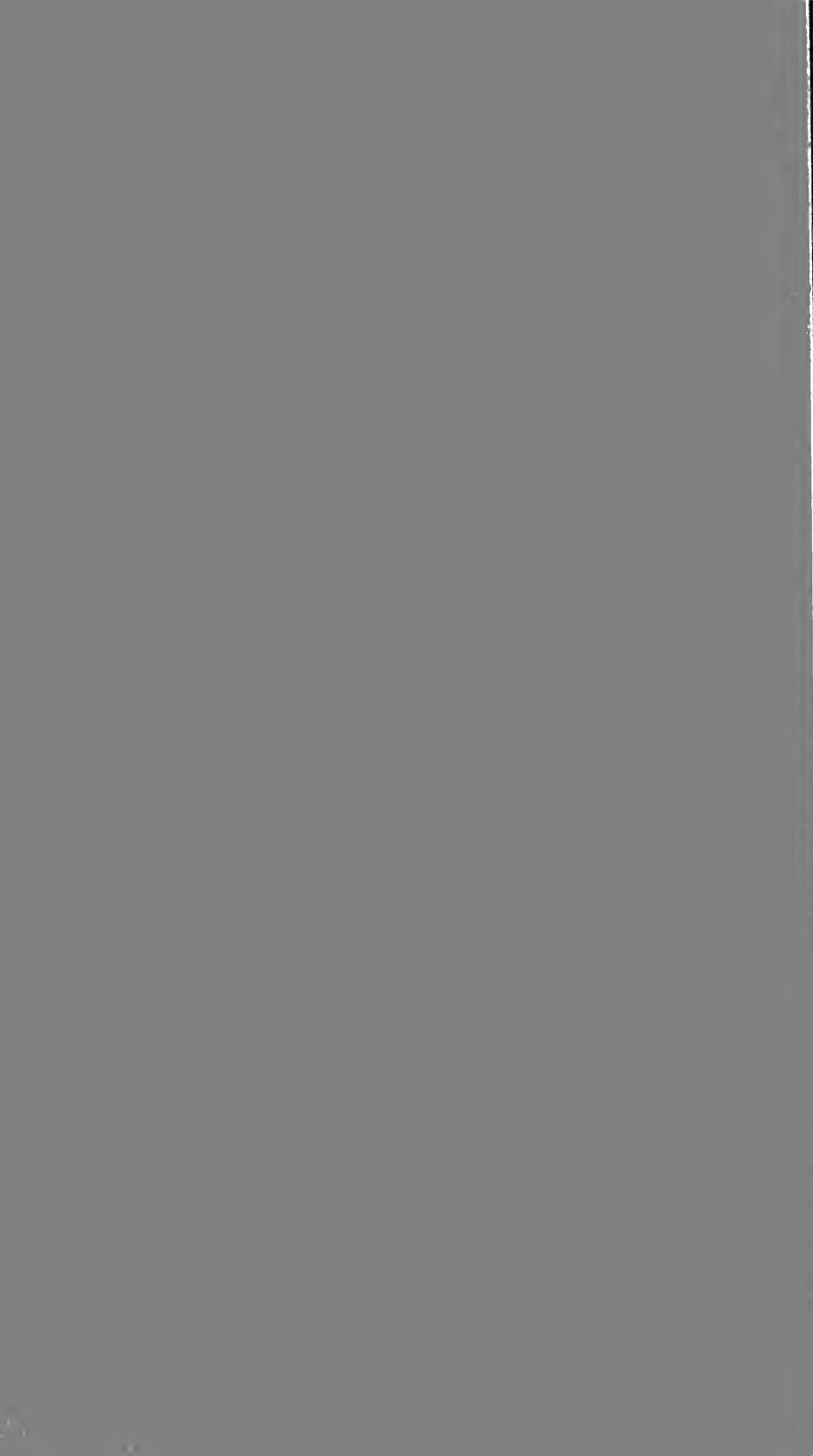
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BRIEF OF APPELLEE, A. S. MENICK, TRUSTEE FOR CECIL M. JACKSON, BANKRUPT.

The record before the Court on the appeal herein is voluminous. There are many hundred pages of testimony as set forth in the Transcript which are a part of this record.

The appellee's Brief is written at what may appear as being at an unusual length. Admittedly it could have been materially shortened and reference made only to the record and transcripts, but it is hoped that the direct quotations from the transcript and the extended explanation of the amended specifications and the amendment thereto, will be of assistance to the Court in its review of this case.

False Financial Statements.

In order to eliminate any confusion with respect to the original specifications and the amendments thereto, the following is set forth:

Specification Six of the original specifications of objections sets forth the giving of a false financial statement to the Security-First National Bank, dated October 6, 1954 and a loan in reliance thereon by the bank of \$1,000 on November 9, 1954.

Specification Seven set forth the giving of a false financial statement to the same bank on August 31, 1955 and, in reliance thereon, a loan by the bank of \$2,000.

The Amended Specifications of Objection to Discharge set forth Specification Four, the giving of a false financial statement to the same bank dated October 6, 1954 and in reliance thereon by a bank, a loan of \$2,000, on or about April 24, 1952.

The Second Amended Specifications of Objection to the Discharge set forth as Specification Four, the giving of a false financial to the said bank dated August 31, 1955 and that in reliance thereon by the bank a loan in the amount of \$2,000 was made.

Upon objection that the trustee did not allege the date of loan, the trustee thereupon filed a further amendment setting forth the date of the making of the \$2,000 loan as September 14, 1955 with the unpaid balance at bankruptcy of \$1,720.

The essence of these Specifications of Objection is that the bankrupt gave a false financial statement to the Security-First National Bank, in reliance upon which the bank extended credit to the bankrupt. The ultimate and succeeding Amendments, which over the objections of the

bankrupt, were permitted by the Referee, were to set forth allegations of facts (which the bankrupt well knew) setting out the date of the false financial statement as August 31, 1955 and the amount of the loan made by the bank to the bankrupt in reliance thereon as \$2,000 and the date of the loan as September 14, 1955.

The bankrupt fought desperately, both before the Referee and the United States District Judge on review, to keep out any testimony on the admittedly false financial statement of August 31, 1955. These tactics were followed with objections because the date of the \$2,000 loan was not originally given, which was thereupon supplied by a further amendment.

The date of the statement was originally given by the trustee through clerical error and the date of the loan was omitted through oversight and accordingly the Referee allowed the Amendments. The bankrupt frantically attempts to make much of these rulings because he had to admit that the statements were false and untrue. He overlooks the fact that the actions remained the same, *i.e.*, the bankrupt and the bank; that the false financial statement was given by the bankrupt to the bank and that in reliance thereon credit was extended by the bank.

The failure of the bankrupt to secure his discharge by no means rests on this particular specification as we will point out hereinafter. Nevertheless we desire to devote further time and space to point out support to the determinations of the Referee and the Judge.

This Court, in its recent case of *Ramson Bros., et al. v. Goggin*, 241 F. 2d 271, at page 273, said:

“In any event, following the liberal views in an early case, the Courts have held that a referee has the power to permit specifications objecting to the dis-

charge to be filed late where good reason appears and the delay is not for the purpose of putting improper pressure upon the bankrupt.”

The opinion further states at page 275:

“Where the referee and District Judge concur as to findings, little is left for Appellate Courts.”

A number of cases are then cited in the opinion.

In passing, the writer of this brief recalls that one of the cases which is cited in the *Rameson* case (*Richey v. Ashton*, 143 F. 2d 442), is a case in which the original order denying the discharge which was affirmed on review and subsequently affirmed on appeal by this Court, was made by the writer, who was then acting as one of the Referees of the United States District Court, Southern District of California.

The spirit of the Bankruptcy Act as expressed in Section 14c: “The court shall grant the discharge unless satisfied that the bankrupt has (1) committed,” etc. This of itself connotes liberality in presenting to the Court, by the creditors or the trustee, of grounds of objections. The discharge proceeding itself is not governed by stringent technicalities. The bankrupt was not taken by surprise. He knew of the exact date of the statement to the bank. He knew the statements were false. He received a loan of \$2,000 from the bank made in reliance thereon and he knew the date on which he received the loan.

Thus the determination of the Referee and the Judge that the bankrupt should answer and explain was not inequitable. “There was no improper pressure put on the bankrupt.”

Paully v. Magnotti (2nd Cir., 1950), 182 F. 2d 466, cites the *Richey* case with approval and permitted the filing of specifications after the time had expired.

Matter of Joseph Meckler, Bankrupt (Nov. 6, 1957),
156 Fed. Supp. 20:

“The discharge of bankrupt is deemed to be pending before the court or referee in bankruptcy until it is granted. Bankruptcy Act Sections 14, subs. b, e, 21 sub. a, 11 U. S. C. A. Sections 32, subs. b, e, 44 Sub. a.

“The court may in its discretion, extend time for entering appearance in bankruptcy proceeding as well as for filing specification of objections to discharge of bankrupt after time has expired for filing objections to discharge. . . .

“Under the Act of 1938, the matter is still in the discretion of the referee. In *re Weidemeyer, Richey v. Ashton*, 9 Cir., 143 F. Supp. 946. In *Northeastern Real Estate Sec. Corp. v. Goldstein*, 2 Cir., 91 F. 2d 942, it was held that the period should be extended to prevent injustice when the bankrupt’s fraud prevented discovery of grounds for objections.”

Matter of W. Taylor Fithian, Bankrupt (Dec. 6, 1957),
156 Fed. Supp. 877:

“Even one day after expiration of time for filing objections to discharge of bankrupt, referee had jurisdiction to extend time for filing objections.

“Referee should extend period for filing objections to discharge of bankrupt in cases where discovery of possible grounds for objection to discharge has been prevented by acts or omissions of bankrupt; but he should not extend period when trustee is chargeable with unreasonable delay in obtaining facts, without fault on part of bankrupt. . . .”

In the case at bar, it can be easily seen how the chaotic condition of the bankrupt’s records precluded the Trustee from analyzing his ramified transactions more speedily.

The Financial Statements Were Admittedly False.

The bankrupt admitted that the financial statements given to the Union Hardware and Metal Company on April 25, 1952 and to the Security-First National Bank on August 31, 1955, were false and untrue and that thereafter he received extension of credits or loans respectively, from the company and the bank.

A *prima facie* case was made by the trustee and as was said in the case of the Second Circuit, *Matter of Federal Provision Co., Inc. v. Ershowsky, et al.*, 94 F. 2d 574 (1938):

“ . . . the laboring oar passes to his hands and he must bring the boat to shore. It is he . . . who alone knows what the explanation is; let him make it, let him satisfy the court. . . .”

The bankrupt's explanations are ingenious, but clumsy and he contends:

1. That he signed the financial statement (Union Hardware and Metal Company) in blank.

From the Transcript, page 74, line 5:

“I question very much that I ever read this. I know I signed it, but many times—or there has been an occasion when I have signed a statement and it has been filled out or it has been filled out and mailed without my scrutinizing every item on it.”

2. That when the said company asked for the financial statement the bankrupt testified [Tr. p. 73, line 7]:

“ . . . I took it to the bookkeeper and he made it out and I signed it and I believe he mailed it to Union Hardware. . . . I didn't know that it said I

did not owe any notes. I didn't make it out and like I say, don't think I even mailed this statement. . . ."

Page 75, line 12:

"I don't think I check it—it was known in the office that there were other loans made, that I had made loans—I mean to say in the bookkeeper's office."

3. As to the Security-First National Bank statement of August 31, 1955, the bankrupt testified [Tr. p. 21, line 8]:

"When the bank asked me for a financial statement—I took the statement to my bookkeeper and I told him that the bank wanted a financial statement, that I wanted to make a loan. I left the entire matter with my bookkeeper."

[Tr. p. 21, line 22]:

"The Referee: When you refer to the accountant, are you referring to the bookkeeper, the same man?"

Bankrupt: The same firm, yes."

The Auditor.

When the bankrupt is forced to admit that his financial statements are false what avenue is open to him? He produced Philip Edward Whiting as a witness, who testified that he is a Certified Public Accountant who was familiar with the records of the bankrupt.

[Tr. p. 338, line 6]: "I knew of that loan (Far East Missionary Society) I don't know whether my records happen to indicate it."

[Tr. p. 341, line 7]: “He assisted me in the preparation of the return.” (Financial statement of September 30, 1950.)

And explains that he left out the personal obligations “because they were personal.”

[Tr. p. 342, line 24], that he prepared the Oct. 31, 1953 statement and that no personal loan obligations of the bankrupt were listed.

[Tr. p. 345, line 12]: At this stage the witness stated, “Very seldom is a financial statement prepared for an individual by our firm.”

And when asked if the statement in question (which eliminated many thousands of dollars of existing personal loans) was not “completely inaccurate,” the auditor testified and admitted:

[Tr. p. 347, line 5]: “It is not inaccurate. *It is not completely accurate to a lending person to use for the sale basis of a loan.*”

The auditor testified of his advice to the bankrupt that:

[Tr. p. 351, line 19]: “. . . it was my determination that they were personal loans and had no bearing whatsoever on the statement that was being prepared, and that was it.”

[Tr. p. 353, line 22]: That the bankrupt came to him and said the Union Hardware & Metal Company wanted a statement.

[Tr. p. 354, line 2], that he talked to the bankrupt, that he was aware of the loans (\$14,000—Far East Misisonary Society and Mary Koch) and was aware of some loans which he considered personal.

With respect to the financial statement dated August 31, 1955 given to the Security-First National Bank [Trustee's Ex. 3.]

[Tr. p. 302, line 2], the said auditor testified that he was aware of the Far East Missionary \$14,000 loan and the other personal loans and omitted them from the statement.

[Tr. p. 362, line 9]: That before the statement was prepared he discussed it with the bankrupt.

[Tr. p. 370, line 11]: That the item of Trade Accounts Payable of \$3,000 which appears in the August 31, 1955 statement was an *estimate furnished by the bankrupt*.

[Tr. p. 386, line 26]: But he would not admit that the statement was untrue.

[Tr. p. 399, lines 10-22]: The accountant also testified that the \$14,000 from the Far East Missionary Society went into the bank account of the bankrupt which was the only account he then maintained and that it was a *personal and business account*.

[Tr. p. 473, line 1]: The bankrupt explained that a "shaky condition" existed at the time of the giving of the August 31, 1955 statement to the Security-First National Bank. When confronted with the net worth of \$70,000, as reported thereon, the attorney from the bankrupt objected. He was overruled by the Referee and the bankrupt passed the buck once more with the testimony [line 26], "*The accountant made out the statement—the bank knew I was shaky.*"

And on Transcript, page 474, line 18, when asked "and you realized you didn't have any net worth of \$70,000, didn't you?" replied "*I didn't even look at that statement.*"

The recent case decided May 23, 1958 by the United States Court of Appeals, Fourth Circuit, *Mountain Trust*

Bank v. Shifflett, 255 F. 2d 719, clearly sets forth the law applicable to several particular phases of this case:

1. That the Referee's Order denying discharge on the grounds that a bankrupt made a materially false statement in obtaining a loan, will not be disturbed on appeal unless clearly erroneous.

2. Referee's findings are clearly significant where he has heard and observed the witnesses. Clear statement of manager of bank as opposed to uncertain testimony of bankrupt. There was an omission from the financial statement of debt due bankrupt's father.

3. (From the opinion, p. 720): "The conclusion of the Referee was fortified by the provision of Section 14, sub. c of the Bankruptcy Act that when an objector to a discharge of the bankrupt shows that there are reasonable grounds for believing that the bankrupt has committed any of the acts—the burden is on the bankrupt to prove he has not committed any of such acts."

The creditor's testimony that he relied upon bankrupt's statements in application for loan, which statement was false and/or incomplete, made a *prima facie* case for the objector and cast a burden of establishing non-reliance upon the bankrupt. In the *Matter of Morris Siegel* (U. S. D. C. E. D. N. Y., 1958), 159 Fed. Supp. 704.

Bankrupt's discharge denied even though he contended that the objecting creditor's own employees induced the bankrupt to make the false statement. *In re Robinette* (U. S. D. C. N. D. Ohio, 1953), 117 Fed. Supp. 367.

The bankrupt could not read or write more than his own name, but had had considerable experience with loans and was aware of the requirement that existed that debts should be fully disclosed and the signing of financial statement which was necessary for the loan, with reckless

indifference as to its truth was sufficient to prevent his discharge, if the statement was relied upon to the detriment of a creditor, although the bankrupt did not actually know the statement was false. (*In re Santos*, 211 F. 2d 887.)

Where wife allowed husband to do business in her name and signed without question a statement concerning her financial condition with reckless indifference to the actual facts and without reasonable grounds to believe the statement was in fact correct—discharge denied. (*David v. Annapolis Banking & Trust Company*, 209 F. 2d 343.)

The mere reliance upon a bookkeeper as to the completeness and correctness of a financial statement prepared by him, without check by the bankrupt to determine its accuracy, is fatal to the bankrupt's discharge. (*In re Strauss* (U. S. D. C. E. D. N. Y., 1933), 4 Fed. Supp. 810; *In re Ratner* (U. S. D. C. W. D. Pa., 1932), 2 Fed. Supp. 530.)

The failure of the bankrupt to read the statements and thus apprise himself of their contents before signing and delivering them was inexcusable. (*In re Haggerty* (E. D. N. Y.), 65 Fed. Supp. 630; *In re Cleveland* (W. D. Mich.), 40 Fed. Supp. 343.)

Records of the Bankrupt.

The Referee found that the trustee had not sustained his Specification One—Failure to Keep Books of Account and Specification Two—Concealment or Failure to Produce Secret Records from which his financial condition and business transactions might be ascertained.

The bankrupt and his auditor both explained the unique system maintained by the bankrupt to record certain of his financial transactions, *i.e.*, memoranda jotted down on

envelopes on or memoranda inside thereof. No ledger, journal or the usual, conventional books of account were kept. The auditor stated that prior to bankruptcy the said usual records and books were not kept. They both insisted that from the records, the financial condition could be ascertained, although the auditor admitted it would take *investigation* with debtors to *verify the accounts*. On these two Specifications as aforesaid, the trustee did not prevail.

However, the Referee found that the bankrupt had failed to satisfactorily account for loss of assets or deficiency of assets to meet his liabilities. And, with justification for so doing, the Referee held that the bankrupt had failed to satisfactorily explain the discrepancy existing between the net worth claimed by him in his financial statements, to-wit: to Union Hardware and Metal Company, net worth \$39,240.44; to Security-First National Bank, October 6, 1954, net worth \$53,912.96 and August 31, 1955, net worth \$71,076.92 and his liabilities at date of bankruptcy, August 2, 1956 of \$145,616.43 with assets, including exempt property totalling only \$26,625.56.

This Specification five confronted the bankrupt at the inception of the hearing on the objections. Most certainly there was a sound basis for the charge against the bankrupt. He had, by his own statements, a net worth of \$71,000 on August 31, 1955 and a net loss of \$119,000 (\$145,616.43 less \$26,625.96) at the date of bankruptcy on August 2, 1956, which most certainly required explanation and far more information and explanation than was given to the Referee by the bankrupt and his auditor. The Referee apparently did not believe the explanation which either of them gave and accordingly made the finding that there was not adequate explanation.

When it is said that the records in possession of the bankrupt were "adequate," it is to be kept in mind that the records were not books of account as such term is commonly used. When the testimony of the bankrupt, his auditor and the auditor for the trustee is reviewed, the records appear as flimsy as a doll house. No books of account as such—loose memoranda of \$14,000 and \$18,000 loan transactions noted on envelopes, no permanent record maintained in any particular place, form or manner was all he could, or at least, did produce.

The bankrupt insisted without success, both before the Referee and the Judge, that if the Referee found there were records and books of account he could not find that the bankrupt had not satisfactorily accounted for the losses of assets to meet liabilities. The Referee removed one horn of the dilemma from the bankrupt, but he left him firmly attached to the other. The same general situation prevailed in the *Rameson Brothers v. Goggin*, case, *supra*, and there, even though by investigation the trustee was able to ferret out the obligations and assets, *the Court nevertheless held that the bankrupt had failed to account.*

The following shows the difficulty encountered by the bankrupt in accounting for his deficiency in assets to meet his liabilities or in plain words, *where did the money received from many women go?*

1. Transcript of bankrupt's examination August 1, 1957, page 463, line 18 *in re* use of the \$2,000 received from the Security-First National Bank—"I don't recall how that was used—I haven't a ledger" Tr. p. 464, line 12 *in re* \$3,200 loan from Milton Smith as to the date of borrowing the bankrupt said—"I *believe* in one of those envelopes it will show." [Tr. p. 465, line 14 *in re* loan from A. S. Ameil \$250—"I used part of it for the

development of my business, part of it to pay back loans." Tr. p. 465, line 25 *in re* C. A. and Marian Miller \$2,900 loan—"I used that to purchase a lot," Tr. p. 466, line 3 "I lost a thousand dollars approximately in the transaction. I used it to pay bills personal and *business*. It was all the same." Tr. p. 467, line 9 *in re* loan from Eugene and Helen Poole \$2,000, the bankrupt testified—"Some went into experimentation, some went into paying off loans and some went for personal needs." Tr. p. 468, line 6 *in re* loan from Angel Nahabedian of \$12,000 (an accumulation of loans totalling \$12,000)—"it was to go in *business*, to pay personal debts and for living expenses." Tr. p. 469, *in re* loan from Ira and Dorothy King of \$7,500—the bankrupt explained that some went into business and when asked if the bankrupt's records revealed the loans the bankrupt replied—line 21 "*I don't know what they show.*" Tr. p. 469, line 25 *in re* loan from Guy Cooper of \$3,000 June 21, 1956. The bankrupt was asked if it went into the business and he answered—"I do not remember." Tr. p. 470, line 4 *in re* loan from Billy Long of \$6,500—"I think the part of that went to pay bills—personal and *business obligations*." Tr. p. 470, line 14 *in re* loan of \$900 from Florence Davis May 20, 1955, bankrupt did not remember if it went into business. [Tr. p. 470 *in re* loan of \$11,140 from Teresa Hagopian 1955 bankrupt testified some of money went into business, and that he couldn't tell how much. Tr. p. 471, line 2—"I don't remember." Tr. p. 471, line 12 *in re* loan of \$6,700 from R. L. and Beatrice McMillan July, 1955, bankrupt testified some of it went into business but he didn't remember how much. Tr. p. 471, line 16 *in re* loan of \$2,000 from W. W. McCaslin, 1955-1956 bankrupt testified that it could have gone into the business or to pay another loan. Tr. p. 475, line 2 *in re* loan from Floyd Gresset of \$550

the bankrupt testified in answer to the question if it went into the business, "I don't remember." Tr. p. 475, line 7 *in re* loan from Far East Missionary Society of \$14,000, the bankrupt testified that it went *into the business*. And, later at line 22, "but I still can't see that it was a business obligation."

On the subject of cashiers checks (which incidentally are literally "red flags" when attempts are made to conceal funds), the bankrupt testified Tr. p. 472 that he *bought a lot* of cashiers checks—line 16 because his credit was poor and in some case cash was demanded of him. Tr. p. 473, line 1 "What I'm trying to say is that my financial position was so shaky when I had money I had to either *pay it out in cash where I wouldn't have a record or get a cashiers check where I at least would have a record*—the 'shaky condition' was over several years."

It is quite obvious that if the bankrupt himself did not know what he did with the money or what part of the loans went into business or were used for other purposes, that he could never account or give the explanation required by him. If the bankrupt cannot explain to the Court what became of many thousands of dollars of loans, how and from whom can this fact be ascertained, if not from the bankrupt?

It will be observed from the above that most of the loans referred to hereinabove were business loans or in part business loans, ostensibly made to the bankrupt (as was the loan of the bank) for use in his business. Attention is called to the fact the auditor knew at least *of some* of these loans, but despite this fact, he maintained that they should not be included in the *financial statements*.

The bankrupt and his auditor both attempted to make a fine distinction between loans and other funds which

went into the business as distinguished from that part which was used for "personal affairs." Unless the funds went into the business, the auditor ignored them and in some instances did not even know of their existence. They both contended that funds which went into the business only should be accounted for. Not only that, but also the fact that to creditors, it was none of their business. They also contended that the so-called "personal" loans and the disposition of funds therefrom were no concern of creditors.

**The Questions With Respect to Extension of Credit
and Reliance Upon the Financial Statements
Were Proper.**

The appellant's opening brief refers to the case of *In re Leonard* (U. S. D. C. S. D. Cal.), 122 Fed. Supp. 214 (U. S. District Judge Tolin). In this case the discharge of the bankrupt was granted and the Order denying discharge made by the Referee was reversed upon the ground that "the extension of credit must be after the giving of such a statement and in reliance on it." (P. 218.) Two Referees heard the witness, including the manager of the loan company and various complications ensued. The opinion is quite extended and involves a number of matters. We will not comment further thereon other than to observe that no such leading or suggestive questions were asked of the person extending the credit in the instant case. [See Tr. p. 45, line 23.] No objections were made thereto by counsel for the bankrupt.

Note the extended cross-examination of the witness by counsel for the bankrupt thereafter conducted. [Tr. pp. 45-69.] An attempt was made, without success, to show that even though the statement was admittedly false, credit was extended upon the "good character" of the bankrupt.

False Oath.

Specification Six relates to a false oath made by the bankrupt in failing to list a creditor in his schedules—Far East Missionary Society—\$14,000 note. All of the facts should be considered on this particular matter.

The bankruptcy was filed August 2, 1956. The attorney for the trustee had apparently received information of activities of the bankrupt in the Orient. This is demonstrated by the fact he asked him [Ex. 7, Tr. of examination of bankrupt, August 20, 1956, p. 53] “Do you have any interests abroad in China or Singapore or anything of that nature?” The bankrupt stated “No,” and that the “Mission” owned the property (Far East Missionary Society). Obviously his question alerted the bankrupt to possible further inquiries. He did not know just how much the trustee or his counsel knew.

The examination was continued to September 25, 1956. The bankrupt was called to the stand for further questioning. Thereupon the attorney for the bankrupt [Ex. 7, Tr. p. 58] interrupted the hearing and asked leave to amend the schedules and reveal a loan from the said Far East Missionary Society. The bankrupt was asked how much he owed the said creditor and replied “I don’t know”; and later that it was in the neighborhood of \$10,000; that he was and still is president and director; that he believed he received the money by check.

The following question indicates that the trustee’s counsel had a tip or lead which he was following [Ex. 7, Tr. p. 70]:

“Q. This Missionary Society disposed of some property did it not in the Crown Colony of Singapore?”

to which the answer was, "That is right." That its headquarters was at his residence; that the Mission property stood in his name [Ex. 7, Tr. p. 80.] Later the bankrupt further testified in the discharge hearing before Referee Walker [Tr. p. 133] \$21,303.78 net sales proceeds received from the Mission sale, deposited June 12, 1951; that he was loaned \$14,000; that he presided at the meeting of directors when the loan was approved; he produced the Minute Book but it did not include minutes of the loan transaction; that his \$14,000 note to the Far East Missionary Society was dated *June 11, 1951*; that the authorization to make the loan was before the date of the note [Tr. p. 162]; that \$6,500 of the sale proceeds was also given to Dr. Sherman and an additional \$140 given to the bankrupt leaving a balance of \$9.81.

Transcript, page 284, in answer to a question by the bankrupt's counsel, Mr. King, a director of the Mission of which the bankrupt was president, testified that the meeting of the directors was held *after* the loan of \$14,000 was made; that the meeting was held to make legal the loan [p. 285]—"I felt that we ought to let him take this money and use it."

Transcript, page 287, Mr. King testified; that Mr. Jackson, the bankrupt, presided at the meeting; that no inquiry was made as to the legality of the transaction; that he did not know such a loan was illegal; that quite a number of people had put money up to build the mission; that the other directors did not know about the loan. In summary, practically all of the net funds from the sale of the mission was turned over to the bankrupt.

While there was no determination by the Referee as to the legality of the transaction or the morals thereof, the Referee concluded that there was an intent at the

time of signing the schedules, to keep secret that particular loan and that there was a deliberate intent to thus, by this omission, to give false oath to the schedules.

In the original examination of the bankrupt the trustee was endeavoring to locate any assets. *He ended up locating a concealed liability and one, because of the very nature thereof, the bankrupt, for obvious reasons did not want to reveal.*

The Transcript of the Bankrupt's Examination Taken in the Administration of His Bankruptcy Proceedings.

The trustee offered into evidence the Transcript of the examinations held on August 20, 1956, September 25, 1956 and October 30, 1956 [Trustee's Ex. 7]. Counsel for the bankrupt objected to the offer and was overruled by the Referee and the Transcripts were received, marked Trustee's Exhibit 7.

At the time it was received into evidence the Referee stated [Tr. p. 126]:

“Perhaps it should be limited to the portions where he fails to explain.”

As to the objection to the entire Transcript, the Referee stated [Tr. p. 131]:

“Well, I'm afraid, Mr. Sulmeyer, that at the moment you will have to rely on my good judgment to eliminate the objectionable matter, the objectionable material, and to accept the material that is relevant and pertinent to the issues.”

The bankrupt's admissions are admissible in evidence at the hearing on his right to a discharge and testimony given by the bankrupt in the bankruptcy proceedings or in any other proceeding is competent if relevant to the

issues. Collier on Bankruptcy, Vol. 1, p. 1288 citing *Matter of Frankel* (2nd Cir.), 6 F. 2d 1014, and various other cases. See also *Sampsell v. Anches*, 108 F. 2d 945, of this Circuit.

In fact when the bankrupt seeks his discharge he can be confronted with *everything* which he has testified to in his proceeding which is relevant to the issue on the discharge hearing and the Referee stated that he would only consider those matters which were relevant.

Conclusion.

Bankruptcy Courts are Courts of equity. As stated by Circuit Judge Lemmon in the case of *Autrey Brothers v. Chichester*, 240 F. 2d 498:

“We have recently adverted to the well-established principle that ‘courts of bankruptcy are essentially courts of equity.’ Judged in accordance with the equitable norm, the individual and corporate manipulations of the appellant herein with reference to the bankrupt’s property are such as to offend the conscience of a discerning chancellor.”

Viewing the case at bar from the equitable point of view, the conduct of this bankrupt not only throughout his prior dealings, but in his bankruptcy itself, is reprehensible in the extreme.

The Bankruptcy Act was enacted to relieve the unfortunate but honest debtor from the consequences of his former business transactions.

Matter of Salverson, 14 A. B. R. (N. S.) 422 (U. S. D. C., Minn.):

“Anyone asking to be discharged from his debts without payment thereof is craving a great privilege. . . . The bankruptcy laws rightly provide a proper

haven of refuge to a limited number, who, by reason of great misfortunes come fairly within the class which those laws were designed to aid. . . . When people like this bankrupt make up their minds either that they cannot or that they will not pay their debts, all that they need to do, when they invoke the provisions of our very indulgent law, is to go straightforward and see that they shall not come within the teeth of its provisions. Then no harm will come. . . . If they try any other course, they need not be surprised and should not complain if they find that they have pulled the house down upon their own heads. . . . The application for discharge should be denied.”

This bankrupt Jackson is not deserving of any consideration at the hands of a court of equity.

We therefore respectfully submit that the judgment of the District Court should be affirmed.

Dated: March 4, 1959.

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No. 16314

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in bankruptcy of Cecil M. Jackson,
bankrupt,

Appellee.

BRIEF OF APPELLEE, A. S. MENICK, TRUSTEE
FOR CECIL M. JACKSON, BANKRUPT.

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**BRIEF OF APPELLEE, A. S. MENICK, TRUSTEE
FOR CECIL M. JACKSON, BANKRUPT.**

The record before the Court on the appeal herein is voluminous. There are many hundred pages of testimony as set forth in the Transcript which are a part of this record.

The appellee's Brief is written at what may appear as being at an unusual length. Admittedly it could have been materially shortened and reference made only to the record and transcripts, but it is hoped that the direct quotations from the transcript and the extended explanation of the amended specifications and the amendment thereto, will be of assistance to the Court in its review of this case.

False Financial Statements.

In order to eliminate any confusion with respect to the original specifications and the amendments thereto, the following is set forth:

Specification Six of the original specifications of objections sets forth the giving of a false financial statement to the Security-First National Bank, dated October 6, 1954 and a loan in reliance thereon by the bank of \$1,000 on November 9, 1954.

Specification Seven set forth the giving of a false financial statement to the same bank on August 31, 1955 and, in reliance thereon, a loan by the bank of \$2,000.

The Amended Specifications of Objection to Discharge set forth Specification Four, the giving of a false financial statement to the same bank dated October 6, 1954 and in reliance thereon by a bank, a loan of \$2,000, on or about April 24, 1952.

The Second Amended Specifications of Objection to the Discharge set forth as Specification Four, the giving of a false financial to the said bank dated August 31, 1955 and that in reliance thereon by the bank a loan in the amount of \$2,000 was made.

Upon objection that the trustee did not allege the date of loan, the trustee thereupon filed a further amendment setting forth the date of the making of the \$2,000 loan as September 14, 1955 with the unpaid balance at bankruptcy of \$1,720.

The essence of these Specifications of Objection is that the bankrupt gave a false financial statement to the Security-First National Bank, in reliance upon which the bank extended credit to the bankrupt. The ultimate and succeeding Amendments, which over the objections of the

bankrupt, were permitted by the Referee, were to set forth allegations of facts (which the bankrupt well knew) setting out the date of the false financial statement as August 31, 1955 and the amount of the loan made by the bank to the bankrupt in reliance thereon as \$2,000 and the date of the loan as September 14, 1955.

The bankrupt fought desperately, both before the Referee and the United States District Judge on review, to keep out any testimony on the admittedly false financial statement of August 31, 1955. These tactics were followed with objections because the date of the \$2,000 loan was not originally given, which was thereupon supplied by a further amendment.

The date of the statement was originally given by the trustee through clerical error and the date of the loan was omitted through oversight and accordingly the Referee allowed the Amendments. The bankrupt frantically attempts to make much of these rulings because he had to admit that the statements were false and untrue. He overlooks the fact that the actions remained the same, *i.e.*, the bankrupt and the bank; that the false financial statement was given by the bankrupt to the bank and that in reliance thereon credit was extended by the bank.

The failure of the bankrupt to secure his discharge by no means rests on this particular specification as we will point out hereinafter. Nevertheless we desire to devote further time and space to point out support to the determinations of the Referee and the Judge.

This Court, in its recent case of *Rameson Bros., et al. v. Goggin*, 241 F. 2d 271, at page 273, said:

“In any event, following the liberal views in an early case, the Courts have held that a referee has the power to permit specifications objecting to the dis-

charge to be filed late where good reason appears and the delay is not for the purpose of putting improper pressure upon the bankrupt."

The opinion further states at page 275:

"Where the referee and District Judge concur as to findings, little is left for Appellate Courts."

A number of cases are then cited in the opinion.

In passing, the writer of this brief recalls that one of the cases which is cited in the *Rameson* case (*Richey v. Ashton*, 143 F. 2d 442), is a case in which the original order denying the discharge which was affirmed on review and subsequently affirmed on appeal by this Court, was made by the writer, who was then acting as one of the Referees of the United States District Court, Southern District of California.

The spirit of the Bankruptcy Act as expressed in Section 14c: "The court shall grant the discharge unless satisfied that the bankrupt has (1) committed," etc. This of itself connotes liberality in presenting to the Court, by the creditors or the trustee, of grounds of objections. The discharge proceeding itself is not governed by stringent technicalities. The bankrupt was not taken by surprise. He knew of the exact date of the statement to the bank. He knew the statements were false. He received a loan of \$2,000 from the bank made in reliance thereon and he knew the date on which he received the loan.

Thus the determination of the Referee and the Judge that the bankrupt should answer and explain was not inequitable. "There was no improper pressure put on the bankrupt."

Paully v. Magnotti (2nd Cir., 1950), 182 F. 2d 466, cites the *Richey* case with approval and permitted the filing of specifications after the time had expired.

Matter of Joseph Meckler, Bankrupt (Nov. 6, 1957),
156 Fed. Supp. 20:

“The discharge of bankrupt is deemed to be pending before the court or referee in bankruptcy until it is granted. Bankruptcy Act Sections 14, subs. b, e, 21 sub. a, 11 U. S. C. A. Sections 32, subs. b, e, 44 Sub. a.

“The court may in its discretion, extend time for entering appearance in bankruptcy proceeding as well as for filing specification of objections to discharge of bankrupt after time has expired for filing objections to discharge. . . .

“Under the Act of 1938, the matter is still in the discretion of the referee. In *re Weidemeyer, Richey v. Ashton*, 9 Cir., 143 F. Supp. 946. In *Northeastern Real Estate Sec. Corp. v. Goldstein*, 2 Cir., 91 F. 2d 942, it was held that the period should be extended to prevent injustice when the bankrupt’s fraud prevented discovery of grounds for objections.”

Matter of W. Taylor Fithian, Bankrupt (Dec. 6, 1957),
156 Fed. Supp. 877:

“Even one day after expiration of time for filing objections to discharge of bankrupt, referee had jurisdiction to extend time for filing objections.

“Referee should extend period for filing objections to discharge of bankrupt in cases where discovery of possible grounds for objection to discharge has been prevented by acts or omissions of bankrupt; but he should not extend period when trustee is chargeable with unreasonable delay in obtaining facts, without fault on part of bankrupt. . . .”

In the case at bar, it can be easily seen how the chaotic condition of the bankrupt’s records precluded the Trustee from analyzing his ramified transactions more speedily.

The Financial Statements Were Admittedly False.

The bankrupt admitted that the financial statements given to the Union Hardware and Metal Company on April 25, 1952 and to the Security-First National Bank on August 31, 1955, were false and untrue and that thereafter he received extension of credits or loans respectively, from the company and the bank.

A *prima facie* case was made by the trustee and as was said in the case of the Second Circuit, *Matter of Federal Provision Co., Inc. v. Ershowsky, et al.*, 94 F. 2d 574 (1938):

“ . . . the laboring oar passes to his hands and he must bring the boat to shore. It is he . . . who alone knows what the explanation is; let him make it, let him satisfy the court. . . .”

The bankrupt's explanations are ingenious, but clumsy and he contends:

1. That he signed the financial statement (Union Hardware and Metal Company) in blank.

From the Transcript, page 74, line 5:

“I question very much that I ever read this. I know I signed it, but many times—or there has been an occasion when I have signed a statement and it has been filled out or it has been filled out and mailed without my scrutinizing every item on it.”

2. That when the said company asked for the financial statement the bankrupt testified [Tr. p. 73, line 7]:

“ . . . I took it to the bookkeeper and he made it out and I signed it and I believe he mailed it to Union Hardware. . . . I didn't know that it said I

did not owe any notes. I didn't make it out and like I say, don't think I even mailed this statement. . . ."

Page 75, line 12:

"I don't think I check it—it was known in the office that there were other loans made, that I had made loans—I mean to say in the bookkeeper's office."

3. As to the Security-First National Bank statement of August 31, 1955, the bankrupt testified [Tr. p. 21, line 8]:

"When the bank asked me for a financial statement—I took the statement to my bookkeeper and I told him that the bank wanted a financial statement, that I wanted to make a loan. I left the entire matter with my bookkeeper."

[Tr. p. 21, line 22]:

"The Referee: When you refer to the accountant, are you referring to the bookkeeper, the same man?"

Bankrupt: The same firm, yes."

The Auditor.

When the bankrupt is forced to admit that his financial statements are false what avenue is open to him? He produced Philip Edward Whiting as a witness, who testified that he is a Certified Public Accountant who was familiar with the records of the bankrupt.

[Tr. p. 338, line 6]: "I knew of that loan (Far East Missionary Society) I don't know whether my records happen to indicate it."

[Tr. p. 341, line 7]: "He assisted me in the preparation of the return." (Financial statement of September 30, 1950.)

And explains that he left out the personal obligations "because they were personal."

[Tr. p. 342, line 24], that he prepared the Oct. 31, 1953 statement and that no personal loan obligations of the bankrupt were listed.

[Tr. p. 345, line 12]: At this stage the witness stated, "Very seldom is a financial statement prepared for an individual by our firm."

And when asked if the statement in question (which eliminated many thousands of dollars of existing personal loans) was not "completely inaccurate," the auditor testified and admitted:

[Tr. p. 347, line 5]: "It is not inaccurate. *It is not completely accurate to a lending person to use for the sale basis of a loan.*"

The auditor testified of his advice to the bankrupt that:

[Tr. p. 351, line 19]: ". . . it was my determination that they were personal loans and had no bearing whatsoever on the statement that was being prepared, and that was it."

[Tr. p. 353, line 22]: That the bankrupt came to him and said the Union Hardware & Metal Company wanted a statement.

[Tr. p. 354, line 2], that he talked to the bankrupt, that he was aware of the loans (\$14,000—Far East Misisonary Society and Mary Koch) and was aware of some loans which he considered personal.

With respect to the financial statement dated August 31, 1955 given to the Security-First National Bank [Trustee's Ex. 3.]

[Tr. p. 302, line 2], the said auditor testified that he was aware of the Far East Missionary \$14,000 loan and the other personal loans and omitted them from the statement.

[Tr. p. 362, line 9]: That before the statement was prepared he discussed it with the bankrupt.

[Tr. p. 370, line 11]: That the item of Trade Accounts Payable of \$3,000 which appears in the August 31, 1955 statement was an *estimate furnished by the bankrupt*.

[Tr. p. 386, line 26]: But he would not admit that the statement was untrue.

[Tr. p. 399, lines 10-22]: The accountant also testified that the \$14,000 from the Far East Missionary Society went into the bank account of the bankrupt which was the only account he then maintained and that it was a *personal and business account*.

[Tr. p. 473, line 1]: The bankrupt explained that a "shaky condition" existed at the time of the giving of the August 31, 1955 statement to the Security-First National Bank. When confronted with the net worth of \$70,000, as reported thereon, the attorney from the bankrupt objected. He was overruled by the Referee and the bankrupt passed the buck once more with the testimony [line 26], "*The accountant made out the statement—the bank knew I was shaky.*"

And on Transcript, page 474, line 18, when asked "and you realized you didn't have any net worth of \$70,000, didn't you?" replied "*I didn't even look at that statement.*"

The recent case decided May 23, 1958 by the United States Court of Appeals, Fourth Circuit, *Mountain Trust*

Bank v. Shifflett, 255 F. 2d 719, clearly sets forth the law applicable to several particular phases of this case:

1. That the Referee's Order denying discharge on the grounds that a bankrupt made a materially false statement in obtaining a loan, will not be disturbed on appeal unless clearly erroneous.

2. Referee's findings are clearly significant where he has heard and observed the witnesses. Clear statement of manager of bank as opposed to uncertain testimony of bankrupt. There was an omission from the financial statement of debt due bankrupt's father.

3. (From the opinion, p. 720): "The conclusion of the Referee was fortified by the provision of Section 14, sub. c of the Bankruptcy Act that when an objector to a discharge of the bankrupt shows that there are reasonable grounds for believing that the bankrupt has committed any of the acts—the burden is on the bankrupt to prove he has not committed any of such acts."

The creditor's testimony that he relied upon bankrupt's statements in application for loan, which statement was false and/or incomplete, made a *prima facie* case for the objector and cast a burden of establishing non-reliance upon the bankrupt. In the *Matter of Morris Siegel* (U. S. D. C. E. D. N. Y., 1958), 159 Fed. Supp. 704.

Bankrupt's discharge denied even though he contended that the objecting creditor's own employees induced the bankrupt to make the false statement. *In re Robinette* (U. S. D. C. N. D. Ohio, 1953), 117 Fed. Supp. 367.

The bankrupt could not read or write more than his own name, but had had considerable experience with loans and was aware of the requirement that existed that debts should be fully disclosed and the signing of financial statement which was necessary for the loan, with reckless

indifference as to its truth was sufficient to prevent his discharge, if the statement was relied upon to the detriment of a creditor, although the bankrupt did not actually know the statement was false. (*In re Santos*, 211 F. 2d 887.)

Where wife allowed husband to do business in her name and signed without question a statement concerning her financial condition with reckless indifference to the actual facts and without reasonable grounds to believe the statement was in fact correct—discharge denied. (*David v. Annapolis Banking & Trust Company*, 209 F. 2d 343.)

The mere reliance upon a bookkeeper as to the completeness and correctness of a financial statement prepared by him, without check by the bankrupt to determine its accuracy, is fatal to the bankrupt's discharge. (*In re Strauss* (U. S. D. C. E. D. N. Y., 1933), 4 Fed. Supp. 810; *In re Ratner* (U. S. D. C. W. D. Pa., 1932), 2 Fed. Supp. 530.)

The failure of the bankrupt to read the statements and thus apprise himself of their contents before signing and delivering them was inexcusable. (*In re Haggerty* (E. D. N. Y.), 65 Fed. Supp. 630; *In re Cleveland* (W. D. Mich.), 40 Fed. Supp. 343.)

Records of the Bankrupt.

The Referee found that the trustee had not sustained his Specification One—Failure to Keep Books of Account and Specification Two—Concealment or Failure to Produce Secret Records from which his financial condition and business transactions might be ascertained.

The bankrupt and his auditor both explained the unique system maintained by the bankrupt to record certain of his financial transactions, *i.e.*, memoranda jotted down on

envelopes on or memoranda inside thereof. No ledger, journal or the usual, conventional books of account were kept. The auditor stated that prior to bankruptcy the said usual records and books were not kept. They both insisted that from the records, the financial condition could be ascertained, although the auditor admitted it would take *investigation* with debtors to *verify the accounts*. On these two Specifications as aforesaid, the trustee did not prevail.

However, the Referee found that the bankrupt had failed to satisfactorily account for loss of assets or deficiency of assets to meet his liabilities. And, with justification for so doing, the Referee held that the bankrupt had failed to satisfactorily explain the discrepancy existing between the net worth claimed by him in his financial statements, to-wit: to Union Hardware and Metal Company, net worth \$39,240.44; to Security-First National Bank, October 6, 1954, net worth \$53,912.96 and August 31, 1955, net worth \$71,076.92 and his liabilities at date of bankruptcy, August 2, 1956 of \$145,616.43 with assets, including exempt property totalling only \$26,625.56.

This Specification five confronted the bankrupt at the inception of the hearing on the objections. Most certainly there was a sound basis for the charge against the bankrupt. He had, by his own statements, a net worth of \$71,000 on August 31, 1955 and a net loss of \$119,000 (\$145,616.43 less \$26,625.96) at the date of bankruptcy on August 2, 1956, which most certainly required explanation and far more information and explanation than was given to the Referee by the bankrupt and his auditor. The Referee apparently did not believe the explanation which either of them gave and accordingly made the finding that there was not adequate explanation.

When it is said that the records in possession of the bankrupt were "adequate," it is to be kept in mind that the records were not books of account as such term is commonly used. When the testimony of the bankrupt, his auditor and the auditor for the trustee is reviewed, the records appear as flimsy as a doll house. No books of account as such—loose memoranda of \$14,000 and \$18,000 loan transactions noted on envelopes, no permanent record maintained in any particular place, form or manner was all he could, or at least, did produce.

The bankrupt insisted without success, both before the Referee and the Judge, that if the Referee found there were records and books of account he could not find that the bankrupt had not satisfactorily accounted for the losses of assets to meet liabilities. The Referee removed one horn of the dilemma from the bankrupt, but he left him firmly attached to the other. The same general situation prevailed in the *Rameson Brothers v. Goggin*, case, *supra*, and there, even though by investigation the trustee was able to ferret out the obligations and assets, *the Court nevertheless held that the bankrupt had failed to account.*

The following shows the difficulty encountered by the bankrupt in accounting for his deficiency in assets to meet his liabilities or in plain words, *where did the money received from many women go?*

1. Transcript of bankrupt's examination August 1, 1957, page 463, line 18 *in re* use of the \$2,000 received from the Security-First National Bank—"I don't recall how that was used—I haven't a ledger" Tr. p. 464, line 12 *in re* \$3,200 loan from Milton Smith as to the date of borrowing the bankrupt said—"I *believe* in one of those envelopes it will show." [Tr. p. 465, line 14 *in re* loan from A. S. Ameil \$250—"I used part of it for the

development of my business, part of it to pay back loans.” Tr. p. 465, line 25 *in re* C. A. and Marian Miller \$2,900 loan—“I used that to purchase a lot,” Tr. p. 466, line 3 “I lost a thousand dollars approximately in the transaction. I used it to pay bills personal and *business*. It was all the same.” Tr. p. 467, line 9 *in re* loan from Eugene and Helen Poole \$2,000, the bankrupt testified—“Some went into experimentation, some went into paying off loans and some went for personal needs.” Tr. p. 468, line 6 *in re* loan from Angel Nahabedian of \$12,000 (an accumulation of loans totalling \$12,000)—“it was to go in *business*, to pay personal debts and for living expenses.” Tr. p. 469, *in re* loan from Ira and Dorothy King of \$7,500—the bankrupt explained that some went into business and when asked if the bankrupt’s records revealed the loans the bankrupt replied—line 21 “*I don’t know what they show.*” Tr. p. 469, line 25 *in re* loan from Guy Cooper of \$3,000 June 21, 1956. The bankrupt was asked if it went into the business and he answered—“*I do not remember.*” Tr. p. 470, line 4 *in re* loan from Billy Long of \$6,500—“*I think* the part of that went to pay bills—personal and *business obligations.*” Tr. p. 470, line 14 *in re* loan of \$900 from Florence Davis May 20, 1955, bankrupt did not remember if it went into business. [Tr. p. 470 *in re* loan of \$11,140 from Teresa Hagopian 1955 bankrupt testified some of money went into business, and that he couldn’t tell how much. Tr. p. 471, line 2—“I don’t remember.” Tr. p. 471, line 12 *in re* loan of \$6,700 from R. L. and Beatrice McMillan July, 1955, bankrupt testified some of it went into business but he didn’t remember how much. Tr. p. 471, line 16 *in re* loan of \$2,000 from W. W. McCaslin, 1955-1956 bankrupt testified that it could have gone into the business or to pay another loan. Tr. p. 475, line 2 *in re* loan from Floyd Gresset of \$550

the bankrupt testified in answer to the question if it went into the business, "I don't remember." Tr. p. 475, line 7 *in re* loan from Far East Missionary Society of \$14,000, the bankrupt testified that it went *into the business*. And, later at line 22, "but I still can't see that it was a business obligation."

On the subject of cashiers checks (which incidentally are literally "red flags" when attempts are made to conceal funds), the bankrupt testified Tr. p. 472 that he *bought a lot of cashiers checks*—line 16 because his credit was poor and in some case cash was demanded of him. Tr. p. 473, line 1 "What I'm trying to say is that my financial position was so shaky when I had money I had to either *pay it out in cash where I wouldn't have a record or get a cashiers check where I at least would have a record*—the 'shaky condition' was over several years."

It is quite obvious that if the bankrupt himself did not know what he did with the money or what part of the loans went into business or were used for other purposes, that he could never account or give the explanation required by him. If the bankrupt cannot explain to the Court what became of many thousands of dollars of loans, how and from whom can this fact be ascertained, if not from the bankrupt?

It will be observed from the above that most of the loans referred to hereinabove were business loans or in part business loans, ostensibly made to the bankrupt (as was the loan of the bank) for use in his business. Attention is called to the fact the auditor knew at least *of some* of these loans, but despite this fact, he maintained that they should not be included in the *financial statements*.

The bankrupt and his auditor both attempted to make a fine distinction between loans and other funds which

went into the business as distinguished from that part which was used for "personal affairs." Unless the funds went into the business, the auditor ignored them and in some instances did not even know of their existence. They both contended that funds which went into the business only should be accounted for. Not only that, but also the fact that to creditors, it was none of their business. They also contended that the so-called "personal" loans and the disposition of funds therefrom were no concern of creditors.

**The Questions With Respect to Extension of Credit
and Reliance Upon the Financial Statements
Were Proper.**

The appellant's opening brief refers to the case of *In re Leonard* (U. S. D. C. S. D. Cal.), 122 Fed. Supp. 214 (U. S. District Judge Tolin). In this case the discharge of the bankrupt was granted and the Order denying discharge made by the Referee was reversed upon the ground that "the extension of credit must be after the giving of such a statement and in reliance on it." (P. 218.) Two Referees heard the witness, including the manager of the loan company and various complications ensued. The opinion is quite extended and involves a number of matters. We will not comment further thereon other than to observe that no such leading or suggestive questions were asked of the person extending the credit in the instant case. [See Tr. p. 45, line 23.] No objections were made thereto by counsel for the bankrupt.

Note the extended cross-examination of the witness by counsel for the bankrupt thereafter conducted. [Tr. pp. 45-69.] An attempt was made, without success, to show that even though the statement was admittedly false, credit was extended upon the "good character" of the bankrupt.

False Oath.

Specification Six relates to a false oath made by the bankrupt in failing to list a creditor in his schedules—Far East Missionary Society—\$14,000 note. All of the facts should be considered on this particular matter.

The bankruptcy was filed August 2, 1956. The attorney for the trustee had apparently received information of activities of the bankrupt in the Orient. This is demonstrated by the fact he asked him [Ex. 7, Tr. of examination of bankrupt, August 20, 1956, p. 53] "Do you have any interests abroad in China or Singapore or anything of that nature?" The bankrupt stated "No," and that the "Mission" owned the property (Far East Missionary Society). Obviously his question alerted the bankrupt to possible further inquiries. He did not know just how much the trustee or his counsel knew.

The examination was continued to September 25, 1956. The bankrupt was called to the stand for further questioning. Thereupon the attorney for the bankrupt [Ex. 7, Tr. p. 58] interrupted the hearing and asked leave to amend the schedules and reveal a loan from the said Far East Missionary Society. The bankrupt was asked how much he owed the said creditor and replied "I don't know"; and later that it was in the neighborhood of \$10,000; that he was and still is president and director; that he believed he received the money by check.

The following question indicates that the trustee's counsel had a tip or lead which he was following [Ex. 7, Tr. p. 70]:

"Q. This Missionary Society disposed of some property did it not in the Crown Colony of Singapore?"

to which the answer was, "That is right." That its headquarters was at his residence; that the Mission property stood in his name [Ex. 7, Tr. p. 80.] Later the bankrupt further testified in the discharge hearing before Referee Walker [Tr. p. 133] \$21,303.78 net sales proceeds received from the Mission sale, deposited June 12, 1951; that he was loaned \$14,000; that he presided at the meeting of directors when the loan was approved; he produced the Minute Book but it did not include minutes of the loan transaction; that his \$14,000 note to the Far East Missionary Society was dated *June 11, 1951*; that the authorization to make the loan was before the date of the note [Tr. p. 162]; that \$6,500 of the sale proceeds was also given to Dr. Sherman and an additional \$140 given to the bankrupt leaving a balance of \$9.81.

Transcript, page 284, in answer to a question by the bankrupt's counsel, Mr. King, a director of the Mission of which the bankrupt was president, testified that the meeting of the directors was held *after* the loan of \$14,000 was made; that the meeting was held to make legal the loan [p. 285]—"I felt that we ought to let him take this money and use it."

Transcript, page 287, Mr. King testified; that Mr. Jackson, the bankrupt, presided at the meeting; that no inquiry was made as to the legality of the transaction; that he did not know such a loan was illegal; that quite a number of people had put money up to build the mission; that the other directors did not know about the loan. In summary, practically all of the net funds from the sale of the mission was turned over to the bankrupt.

While there was no determination by the Referee as to the legality of the transaction or the morals thereof, the Referee concluded that there was an intent at the

time of signing the schedules, to keep secret that particular loan and that there was a deliberate intent to thus, by this omission, to give false oath to the schedules.

In the original examination of the bankrupt the trustee was endeavoring to locate any assets. *He ended up locating a concealed liability and one, because of the very nature thereof, the bankrupt, for obvious reasons did not want to reveal.*

The Transcript of the Bankrupt's Examination Taken in the Administration of His Bankruptcy Proceedings.

The trustee offered into evidence the Transcript of the examinations held on August 20, 1956, September 25, 1956 and October 30, 1956 [Trustee's Ex. 7]. Counsel for the bankrupt objected to the offer and was overruled by the Referee and the Transcripts were received, marked Trustee's Exhibit 7.

At the time it was received into evidence the Referee stated [Tr. p. 126]:

“Perhaps it should be limited to the portions where he fails to explain.”

As to the objection to the entire Transcript, the Referee stated [Tr. p. 131]:

“Well, I'm afraid, Mr. Sulfmeyer, that at the moment you will have to rely on my good judgment to eliminate the objectionable matter, the objectionable material, and to accept the material that is relevant and pertinent to the issues.”

The bankrupt's admissions are admissible in evidence at the hearing on his right to a discharge and testimony given by the bankrupt in the bankruptcy proceedings or in any other proceeding is competent if relevant to the

issues. Collier on Bankruptcy, Vol. 1, p. 1288 citing *Matter of Frankel* (2nd Cir.), 6 F. 2d 1014, and various other cases. See also *Sampsell v. Anchles*, 108 F. 2d 945, of this Circuit.

In fact when the bankrupt seeks his discharge he can be confronted with *everything* which he has testified to in his proceeding which is relevant to the issue on the discharge hearing and the Referee stated that he would only consider those matters which were relevant.

Conclusion.

Bankruptcy Courts are Courts of equity. As stated by Circuit Judge Lemmon in the case of *Autrey Brothers v. Chichester*, 240 F. 2d 498:

“We have recently adverted to the well-established principle that ‘courts of bankruptcy are essentially courts of equity.’ Judged in accordance with the equitable norm, the individual and corporate manipulations of the appellant herein with reference to the bankrupt’s property are such as to offend the conscience of a discerning chancellor.”

Viewing the case at bar from the equitable point of view, the conduct of this bankrupt not only throughout his prior dealings, but in his bankruptcy itself, is reprehensible in the extreme.

The Bankruptcy Act was enacted to relieve the unfortunate but honest debtor from the consequences of his former business transactions.

Matter of Salverson, 14 A. B. R. (N. S.) 422 (U. S. D. C., Minn.):

“Anyone asking to be discharged from his debts without payment thereof is craving a great privilege. . . . The bankruptcy laws rightly provide a proper

haven of refuge to a limited number, who, by reason of great misfortunes come fairly within the class which those laws were designed to aid. . . . When people like this bankrupt make up their minds either that they cannot or that they will not pay their debts, all that they need to do, when they invoke the provisions of our very indulgent law, is to go straightforward and see that they shall not come within the teeth of its provisions. Then no harm will come. . . . If they try any other course, they need not be surprised and should not complain if they find that they have pulled the house down upon their own heads. . . . The application for discharge should be denied.”

This bankrupt Jackson is not deserving of any consideration at the hands of a court of equity.

We therefore respectfully submit that the judgment of the District Court should be affirmed.

Dated: March 4, 1959.

CRAIG, WELLER & LAUGHARN,

By HUBERT F. LAUGHARN,

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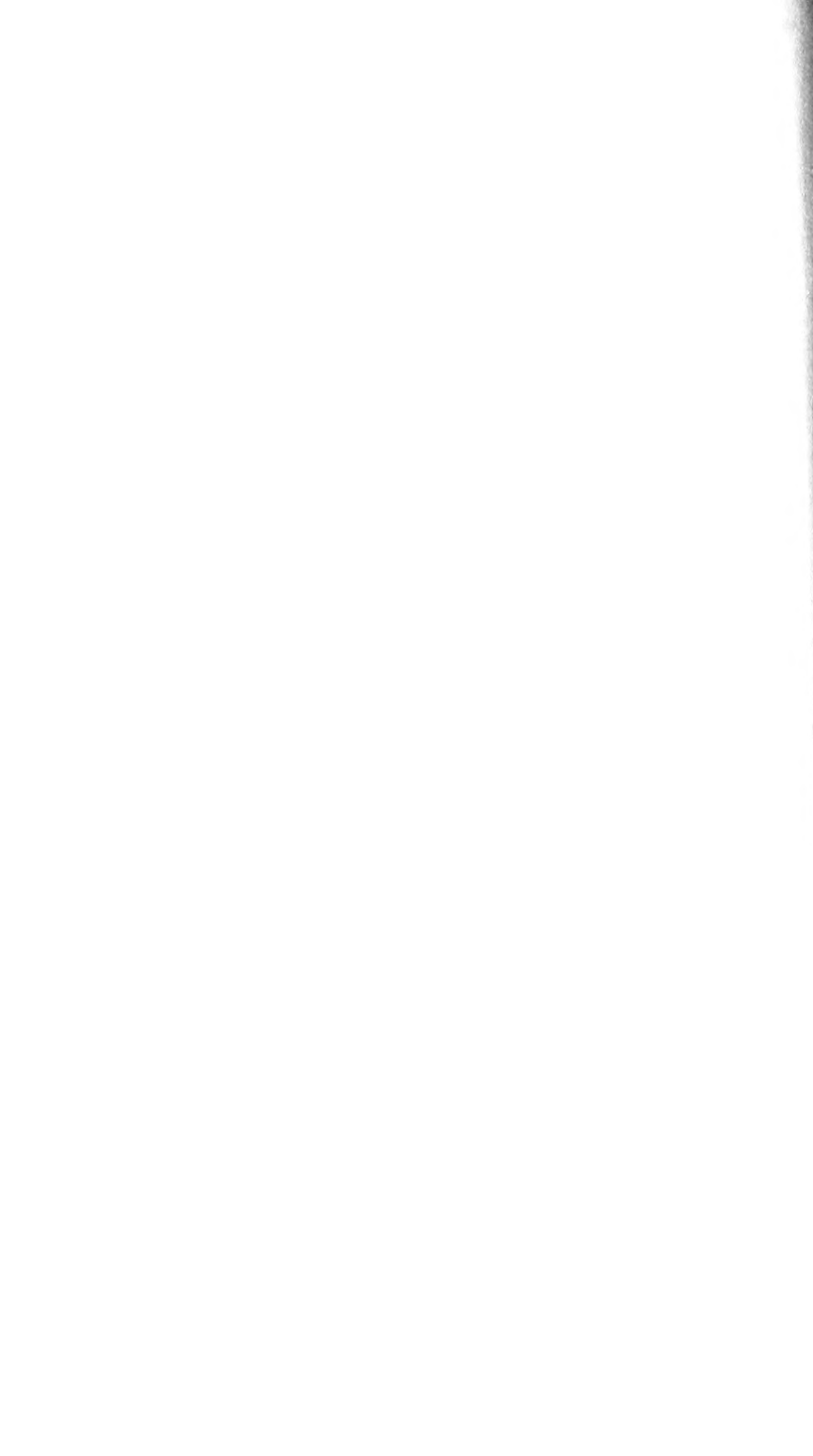
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No. 16317 ✓

See Also
3104

United States
Court of Appeals
for the Ninth Circuit

GEORGE J. TOWLE and FRED GEORGE, Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY, Also Known as TOWLE FOOD PRODUCTS, CO., a Partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUN - 3 1959



No. 16317

United States
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for the Ninth Circuit

GEORGE J. TOWLE and FRED GEORGE, Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY, Also Known as TOWLE FOOD PRODUCTS, CO., a Partnership,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California, Southern Division

Civil Action No. 35653

GEORGE J. TOWLE and FRED GEORGE, In-
dividually and as Co-partners Doing Business
as TOWLE-GEORGE TURKEY LOG COM-
PANY, Also Known as TOWLE FOOD
PRODUCTS CO., a Partnership,
Plaintiffs,

vs.

NORBEST TURKEY GROWERS ASSOCIA-
TION, a Corporation.

Defendant.

COMPLAINT

First Claim

1. Jurisdiction of this complaint is based upon United States Code, Title 28, Section 1332, the controversy being between citizens of different states and the matter in controversy exceeding the sum or value of \$3,000.00, exclusive of interest and costs, all as hereinafter more fully appears.

2. On or about June 1, 1953, Fred George and George J. Towle became associated as general partners under the firm name of Towle-George Turkey Log Company for the purpose, among others, of promoting for profit the manufacture, sale and distribution of a food product hereinafter referred to as "Turkey Log." The principal place of business

of the partnership has been and still is located at the office of George J. Towle at 2710 Mount Diablo Boulevard, Walnut Creek, California. Said partnership has sometimes been known under the firm name and style of "Towle Food Products Co." Said partnership is hereinafter referred to as "the partnership."

3. George J. Towle is a citizen of the State of California and resides in Walnut Creek, California.

4. Fred George is a citizen of the State of California and is temporarily located at Fort Belvoir in the State of Virginia.

5. Norbest Turkey Growers Association is a corporation duly organized and existing under the laws of the State of Utah and has a place of business at 757 Bryant Street in the City and County of San Francisco, State of California.

6. On or about May 25, 1954, Norbest owned an inventory of approximately 190,000 pounds of turkey logs, which said turkey logs were in storage in various warehouses throughout the United States.

7. On or about May 25, 1954, Norbest agreed to sell to George J. Towle and George J. Towle agreed to purchase from Norbest the inventory of said turkey logs then owned by Norbest under the terms and conditions of a written agreement, a copy of which is annexed to this complaint as Exhibit "A" and is incorporated herein by reference.

8. Plaintiff George J. Towle entered into said sales agreement on behalf of the partnership and with the intention that the partnership should receive all of the benefits of said sales agreement, and at all times herein mentioned George J. Towle acted and intended to act on behalf of said partnership.

9. On or about June 10, 1954, the partnership entered into an agreement with Turkey Log Corporation of Illinois, subsequently sometimes known as Towle Food Products, Inc., an Illinois corporation (hereinafter referred to as "Illinois"), wherein the partnership agreed to sell to Illinois and Illinois agreed to purchase from the partnership the said 190,000 pounds of turkey logs, more or less, under the terms and conditions set forth in a written agreement, a copy of which is annexed to this complaint as Exhibit "B" and is incorporated herein by reference.

10. Between May 25, 1954, and July 22, 1954, Towle authorized Norbest to ship some of said turkey logs to Illinois on an open account basis and the partnership billed Illinois for the turkey logs thus shipped.

11. On or about July 22, 1954, the arrangement was changed to the extent that George J. Towle authorized Norbest to ship the turkey logs directly to Illinois and to collect from Illinois the purchase price which Illinois had agreed to pay the partnership and to credit the account of George J. Towle

with the credit representing the difference between the price Towle had agreed to pay Norbest and the price that Illinois had agreed to pay the partnership. This authorization was contained in a writing, received by Norbest from George J. Towle, dated July 22, 1954, the pertinent portion of which provides as follows:

“Mrs. Towle and I are planning on leaving for Europe the first part of August by which time I had hoped that the agreement between your company and the Towle Food Products, Inc., of Chicago and myself would have been completed. Inasmuch as I will not be here at the termination of the contract it would help considerably if you would allow me to have the Towle Food Products, Inc., of Chicago pay you direct rather than their paying me and me paying you. To simplify this, it would probably be easier if you were to invoice the Towle Food Products of Chicago direct on the basis of \$1.05 a pound, f.o.b. Chicago, and crediting my account on the basis of \$.99 per pound with the \$.95 per pound retroactive figure to be credited at the proper time. You, in turn, could pay this office, Towle Manufacturing Co. of Walnut Creek, whatever credits accumulate where they will be deposited in my bank.

“We will not be returning from Europe until the middle of October and I would like to have some satisfactory means of payment between our companies which I am sure you will be agreeable to.”

12. Thereafter, it became apparent that Illinois was delinquent in maintaining its accounts current.

13. On July 29, 1954, the arrangement was again altered and Norbest was authorized to ship turkey logs to Illinois on a sight draft bill of lading basis, the first such shipment so authorized being a shipment of 500 cases (to wit: 21,353 pounds and 13 ounces) of said turkey logs and at a price of \$1.18 a pound.

14. On July 30, 1954, Norbest, by a writing, accepted the foregoing proposals and stated:

“We observe your request to bill at \$1.18 for less than carload and at \$1.15 for carloads. We will be glad to follow your instructions, and at such time as a credit accrues to you, we will forward the money to your organization at Walnut Creek, California.

“I appreciate your calling me today, and I hope that the money on the turkeys now billed will be in to us early next month. I would suggest that if the turkey logs are not all billed by the tenth, that they be transferred over and we will bill them to you.”

15. On August 3, 1954, Towle gave Norbest additional instructions concerning the shipment and payment of said turkey logs. These instructions in writing provided:

“As for future deliveries I think that the sight draft payable to Norbest is the only solution to insure prompt payment.”

16. On August 6, 1954, Norbest, by letter, acknowledged receipt of said new instructions. In this letter Norbest acknowledged receipt of the letter of August 3, 1956, and observed that the lot of turkey logs "must be delivered and paid for as previously stated as we wish to clean up the present inventory."

17. Thereafter, on August 10, 1954, representatives of Norbest, the partnership and Illinois had a conference at Salt Lake City, Utah. At this conference Illinois made arrangements to pay substantial amounts on the balance owing to the partnership on the turkey logs delivered prior to August 3, 1954, and paid said amounts by August 10, 1954. At this meeting it was orally agreed and reaffirmed that all shipments subsequent to July 31, 1954, were to be on a sight draft bill of lading basis.

18. In the interim and during the period from May 25, 1954, to and including July 31, 1954, Norbest delivered to the partnership and/or to Illinois, on order of the partnership, a total of 87,966 pounds and 12 ounces of turkey logs. Norbest received from Towle and the partnership and from Illinois sums totaling \$92,116.13 for said 87,996 pounds and 12 ounces of turkey logs, said payments having been completed by a payment made by Illinois on August 10, 1954. The partnership and Towle owed Norbest for said 87,996 pounds and 12 ounces of turkey logs the total sum of \$87,116.90. As a consequence, on August 10, 1954, Norbest became in-

debted to the partnership and to Towle in the sum of \$4,999.23, no part of which has ever been paid.

19. On August 5, 1954, Norbest delivered 17,872 pounds of turkey logs to Illinois, said turkey logs having been delivered on August 16, 1954, to Kansas Cold Storage Company, Wichita, Kansas. Norbest received for said turkey logs the sum of \$20,892.71. The partnership and Towle owed Norbest the sum of \$17,604.18 for said turkey logs. As a consequence, on August 16, 1954, Norbest became indebted to the partnership and Towle for the sum of \$3,378.53, no part of which has ever been paid.

20. Said delivery of August 16, 1954, brought the total pounds of turkey logs thus far delivered and paid for to an amount in excess of 100,000 pounds, to wit: The total of 105,778 pounds 12 ounces. As a consequence, Norbest thereupon and on August 16, 1954, became indebted to Towle and the partnership for \$.04 a pound for said 105,778 pounds, or for a total of \$4,231.15, no part of which has ever been paid.

21. On August 25, 1954, Norbest delivered to Illinois a total of 29,510 pounds 11 ounces of turkey logs and obtained from Illinois the sum of \$30,996.72 for said turkey logs. The partnership and Towle owed Norbest for said turkey logs the sum of \$28,035.15. As a consequence, on August 25, 1954, Norbest became indebted to Towle and the partnership in the sum of \$2,961.57, no part of which has ever been paid.

22. During the foregoing period of time and in violation of its instructions to deliver turkey logs on sight draft and at the prices stated below, Norbest delivered to Illinois the following logs, for which it was to receive the amounts set forth below:

Date	Invoice	Amount	Unit Price	Extension
Aug. 5, 1954	T-855	3,601 lbs. 13 ozs.	\$1.18	\$ 4,250.14
Aug. 6, 1954	T-858	2,317 lbs. 9 ozs.	1.05	2,433.44
Aug. 9, 1954	T-862	70 lbs. 9 ozs.	1.05	74.09
Aug. 20, 1954	T-904	142 lbs.	1.05	149.10
Aug. 20, 1954	T-905	34,530 lbs. 5 ozs.	1.05	36,256.83
Aug. 23, 1954	T-906	20,845 lbs. 13 ozs.	1.05	21,888.10
Aug. 25, 1954	T-907	925 lbs. 5 ozs.	1.05	971.58
TOTAL		62,433 lbs. 6 ozs.		\$66,023.28

23. Norbest was instructed to deliver said turkey logs totaling 62,433 Lbs. 6 Ozs. on a sight draft basis. 3,601 Lbs. 13 Ozs. thereof at the rate of \$1.18 per pound and the balance at the rate of \$1.05 per pound. Norbest would have realized a total amount of \$66,023.28 if it had followed its instructions. The partnership and Towle had agreed to pay Norbest the sum of \$59,311.71 for said turkey logs. Norbest failed to follow its instructions and delivered said turkey logs on credit. Illinois failed to pay Norbest the said sum of \$66,023.28, but paid Norbest only \$43,956.83 for said turkey logs.

As a consequence, in August, 1954, the partnership and Towle were damaged on the failure of Norbest to follow its instructions and Norbest became indebted to the partnership in the amount of \$6,711.57, no part of which has been paid.

24. George J. Towle, on behalf of himself and on behalf of the partnership, has demanded payment of the sums due to the partnership and Towle from Norbest, and Norbest has refused such payment.

25. The reasonable attorneys fees required to enforce the performance of the contract in which Norbest is in default as recited above is \$7,500.00.

Wherefore, plaintiffs demand judgment against Norbest as follows:

A. The sum of \$4,999.23, plus interest thereon at the rate of 6% per annum from August 10, 1954;

B. The sum of \$3,378.53, plus interest thereon at the rate of 6% per annum from August 16, 1954;

C. The sum of \$4,231.15, plus interest thereon at the rate of 6% per annum from August 16, 1954;

D. The sum of \$2,961.57, plus interest thereon at the rate of 6% per annum from August 25, 1954;

E. The sum of \$6,711.57, plus interest thereon at the rate of 6% per annum from August 25, 1954;

F. Reasonable attorneys fees in the amount of \$7,500.00;

G. Costs and disbursements; and

H. Such other and further relief as may seem meet and just to the Court.

Alternative Claim

26. This claim is an alternative to the claim set forth in paragraphs 1 to 25 of this complaint.

27. Plaintiffs reallege and adopt by reference the allegations set forth in paragraphs 1 to 17, both inclusive, of this complaint.

28. In accordance with the foregoing arrangement, Norbest sold to the partnership and to Towle and Towle and the partnership purchased from Norbest 197,722 pounds 15 ounces of turkey logs for which Towle and the partnership agreed to pay to Norbest the total sum of \$187,836.79.

29. Under the foregoing arrangement Norbest agreed to ship certain of said turkey logs and to credit the amount so received first to the amounts which Towle and the partnership owed to Norbest and to remit the balance to the partnership and to Towle.

30. In performance of its duties with respect to shipments totaling 135,289 pounds of turkey logs, Towle and the partnership paid Norbest \$5,657.48 and Illinois paid Norbest \$138,438.08, resulting in a total of \$144,095.56, which was paid Norbest on said shipments, but in violation of its duty, Norbest failed to remit any portion of said amount to the partnership and/or to Towle.

31. Norbest shipped the balance of said turkey logs, to wit: 62,433 pounds 6 ounces of said turkey logs, to Illinois, all as are itemized in paragraph

22 above, incorporated herein by reference. In violation of its duties and its instructions, as pleaded in paragraphs 13 and 15 above, Norbest shipped said logs on an open account basis rather than on a sight draft bill of lading basis, as required by the arrangements between the partnership and Towle, on the one hand, and Norbest, on the other. Illinois did not make full payment for said 62,433 pounds and 6 ounces of turkey logs, but paid Norbest therefor only the sum of \$43,956.83.

32. If Norbest had followed its instructions in shipping said 62,433 pounds 6 ounces of said turkey logs, Norbest should have received \$66,023.28 for said turkey logs and Norbest then would have received on account of the entire purchase of the entire lot of turkey logs the sum of \$144,095.56 pleaded in paragraph 30, plus the sum of \$66,023.28 pleaded herein, for a total of \$210,118.84.

33. As a consequence of the failure of Norbest to follow its instructions, the partnership and Towle have been damaged in the net amount of \$22,282.05, said amount being the difference between the sum of \$210,118.84 which Norbest would have realized had it followed its instructions and the amount of \$187,836.79 for which Towle and the partnership were liable to Norbest on account of the purchase price of said turkey logs.

34. Plaintiffs incorporate herein by reference paragraphs 24 and 25 of this complaint.

Wherefore, plaintiffs demand judgment against

Norbest in the amount of \$22,282.05 plus interest thereon at the rate of 6% since August 25, 1954, plus reasonable attorneys' fees in the amount of \$7,500.00, plus their costs and disbursements herein incurred, together with such other and further relief as may seem just to the Court.

/s/ EDGAR B. STEWART,

/s/ HOWARD H. BELL,

/s/ CARL HOPPE,

Attorneys for Plaintiffs.

BREED, ROBINSON &
STEWART,

Of Counsel for Plaintiffs.

EXHIBIT A

Sales Agreement

This Agreement executed between Norbest Turkey Growers Association of Salt Lake City, Utah, as "Seller," and George Towle, of Walnut Creek, California, as "Buyer";

In consideration of the covenants herein contained, Seller agrees to sell and Buyer to purchase 190,000 pounds of Turkey Logs upon the following terms and conditions:

1. Buyer will purchase from Seller 190,000 pounds of Turkey Logs at the price of 99c per

pound, F.O.B. Sacramento, California, or Chicago, Ill.

2. Turkey Logs will be withdrawn from storage in lots of 10,000 pounds or more each week commencing;

3. Buyer agrees to pay to Seller at Salt Lake City, Utah, for such Turkey Logs as and when the same are withdrawn from storage at the rate of 99c per pound. After 100,000 pounds have been so withdrawn from storage and paid for by Buyer, Seller will issue to Buyer a credit of 4c per pound upon said 100,000 pounds, and the balance of 90,000 pounds will be paid for at the agreed price of 95c per pound.

4. Buyer agrees to purchase and pay for the entire 190,000 pounds on or before August 1, 1954.

5. In the event of default in the withdrawals as agreed upon or in payment as prescribed, Seller is granted the option to either declare the contract immediately terminated or to resort to such other remedies as may be available. In the event of such termination, notice may be given to Buyer by registered mail or personally, thereby terminating Seller's obligation to deliver any further Turkey Logs to Buyer.

6. In the event of default in performance of this contract, the defaulting party agrees to pay all costs required in enforcement, including reasonable attorney's fees.

Dated this day of, A.D. 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,
Seller.

By /s/ J. R. BARRETT,
Assistant Manager.

/s/ PAUL F. LINDBERG,
Witness.

/s/ GEORGE TOWLE,
Buyer.

/s/ FRED GEORGE,
Witness.

EXHIBIT B

Agreement

Fred George (sometimes hereinafter referred to as "George"), and George J. Towle (sometimes hereinafter referred to as "Towle"), co-partners doing business under the firm name and style "Towle Food Products Co." (sometimes hereinafter referred to as "the partnership"), first party, and Turkey Log Corporation of Illinois (sometimes hereinafter referred to as "the corporation"), second party, hereby agree as follows:

The partnership has contracted to purchase from Norbest Turkey Growers Association (sometimes hereinafter referred to as "Norbest"), one hundred

ninety thousand pounds of processed turkey meat, customarily and hereinafter designated as "turkey logs," and to pay for the same not later than August 1, 1954, with the further provision, however, that during the period prior to August 1, 1954, said partnership from time to time shall take delivery of such turkey logs in minimum quantities of ten thousand pounds and shall pay for the same upon taking such deliveries.

Said one hundred ninety thousand pounds of turkey logs are presently in existence and said logs now existing are the only source of supply for delivery by Norbest to the partnership pursuant to the provisions of said agreement between Norbest and the partnership, and thus are the only source of supply of such logs for the purpose of this agreement between the corporation and the partnership.

The partnership agrees to sell to the corporation and the corporation agrees to purchase from the partnership said one hundred ninety thousand pounds of turkey logs, more or less, upon the following terms and conditions:

1. Said lots will be delivered to the corporation f.o.b. Chicago, Illinois.

2. The price of said lots as so delivered shall be \$1.05 per pound, payable as follows:

- (a) The total purchase price for said one hundred ninety thousand pounds shall be payable on or before August 1, 1954.

(b) The corporation shall be privileged to take delivery of such logs in minimum quantities of ten thousand pounds at any time prior to said August 1, 1954, and in the event of such taking of delivery shall pay to the partnership forthwith the full purchase price of the logs so delivered.

3. The partnership and the individual partners hereby sell, assign and transfer to the corporation the right to use the name "Towle," either alone or in association with other words, in connection with the business and affairs of the corporation.

4. The partnership hereby sells, assigns and transfers unto the corporation one slicing machine now owned by the partnership and label design heretofore used by the partnership and designed by J. Walter Thompson.

5. In consideration of the transfers mentioned in the preceding paragraph hereof, the corporation shall pay to the partnership the further sum of \$2,000, payable \$1,000 on the execution hereof and \$1,000 on or before October 1, 1954.

6. In further consideration of the premises the corporation shall pay to Towle (individually and not as a partner in said partnership) royalties as follows:

(a) Without limit as to time, a royalty of 1c for each pound of turkey (whether in form of turkey log or in other form, and regardless of label used) hereafter sold by the corporation; provided, no such royalty shall be paid with respect to the

one hundred ninety thousand pounds referred to in this agreement.

(b) Without limit as to time, a royalty (in an amount not yet precisely determined) on any other item sold by the corporation in connection with which item or sale the name "Towle" is used. The name "Towle" shall not be used in connection with any such other item unless and until the royalty to be paid to Towle with respect to such item is precisely agreed upon; provided, however, that the parties now agree that Towle may not require such royalty to exceed 1% of the gross sales price of any such item.

(c) All royalties referred to in this agreement shall be payable to Towle monthly on or before the tenth day of each calendar month with respect to sales occurring in the preceding calendar month.

(d) All royalty payments to Towle hereunder shall be accompanied by a full and complete statement of all facts pertaining to the computation of the royalties, and Towle at any and all reasonable times shall be privileged, upon demand, to inspect all books and records of the corporation relating to matters bearing directly or indirectly upon the computation of the within-mentioned royalties.

(e) George shall have no interest in any royalties payable hereunder.

7. The corporation agrees that the aggregate royalties to be paid to Towle during a period of

twelve months next succeeding the date of this agreement shall be not less than the sum of \$5,000 and that commencing thereafter such royalties during each next succeeding twelve-month period shall not be less than the sum of \$5,000. In the event, during any such twelve-month period, such royalties in the aggregate have been less than the sum of \$5,000, then at the option of Towle to be exercised within two months following the expiration of such twelve-month period, this agreement may be terminated and except as hereinafter set forth shall become and be of no further force or effect, and in the event such option be exercised the corporation shall not thereafter use the name "Towle" in any manner whatsoever in connection with the business and affairs of the corporation; provided, however, that in the event such option be not exercised, then the right to exercise the same shall be deemed waived until such later date as there again is a deficiency with respect to one of said twelve-month periods, in the payment of the minimum royalties specified above.*

8. In the event the corporation at any time hereafter engages in any transaction resulting directly or indirectly in the transfer of this agree-

*[The following words were cancelled at the end of this paragraph: Referred to; but provided further, however, that in the event such option is at any time exercised, then the corporation nevertheless thereafter shall continue to pay to Towle in the manner above set forth said royalty of 1c per pound on all turkey sold by the corporation.]

ment, or any rights hereunder, or of its business relating to the sale of turkey in any form, or relating to the sale of any part of its business involving the use of the name "Towle," then the corporation shall disclose to the transferee the provisions of this agreement and shall cause the transferee to obligate itself in writing to continue the payment to Towle of all royalties herein referred to.

9. For the reasons mentioned in the recitals first hereinabove set forth, the corporation releases the partnership from any and all claims which the corporation otherwise might have relating to the failure of the partnership to deliver turkey logs of proper quality in the quantity hereinabove set forth so long as such failure of delivery results from the inability of the partnership to obtain delivery of such proper quality or quantity from Norbest.

10. In the event the corporation defaults in the performance of any of its agreements hereunder, it shall indemnify the partnership against and hold it harmless from all loss, cost or expense resulting from such default or connected with any action taken by the partnership for the purpose of enforcing such performance.

Dated: June 10, 1954.

GEORGE J. TOWLE,

FRED GEORGE,

D.B.A. Towle Food
Products Co.

**TOWLE FOOD PRODUCTS,
INC.,**

An Illinois Corporation, Successor to Turkey Log
Corporation of Illinois;

By L. EDWARD HART, JR.,
Its President, and

[Seal] LYDIA C. NIEMUTH,
Its Secretary.

[Endorsed]: Filed July 10, 1956.

[Title of District Court and Cause.]

ANSWER

Answering the Complaint herein, Defendant alleges:

First Claim

1. Admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 10. Answering Paragraph 12, admits that it was informed that Illinois was delinquent in maintaining its accounts with Towle or the partnership current.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of Paragraphs 8 and 9.

3. Answering Paragraph 11, admits the existence of a letter dated July 22, 1954, from George J. Towle to Defendant, and that the quotation in said paragraph represents in part the contents of

such letter, and denies each and every other allegation contained in said paragraph. Further answering said paragraph, Defendant alleges that no agreement or arrangement existed at any time as between Defendant and George J. Towle or the Plaintiffs or either of them to pay any sum or amount to Towle or the partnership from any sums paid to the Defendant until Defendant had been paid in full for the turkey logs which Towle agreed to purchase under the terms of the agreement attached to the Complaint and marked Exhibit "A."

4. Answering Paragraph 13, admits that it was requested and authorized on or about July 29, 1954, by Towle to ship, and that on or about August 3, 1954, it did ship on a sight draft bill of lading basis a specific shipment of 600 cases (21,383 lbs., 13 ozs.) of turkey logs to purchasers from Towle for which Towle owed the sum of \$21,169.97, and that on or about August 16, 1954, it was paid the sum of \$20,982.71 which was credited on Towle's account and, except as herein admitted, denies each and every other allegation contained in said paragraph.

5. Answering Paragraph 14, admits the existence of a letter dated July 30, 1954, from Defendant to Towle and that the quotation in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph.

6. Answering Paragraph 15, admits the existence of a letter dated August 3, 1954, from Towle

to Defendant and that the quotation contained in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph.

7. Answering Paragraph 16, Defendant admits the existence of a letter dated August 6, 1954, from Defendant to Towle, that in this letter Defendant acknowledged receipt of the letter of August 3, 1956, and that the quotation in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph. Further answering said paragraph, Defendant alleges that neither by the letter of August 6, 1954, nor at any other time nor in any other manner, did it receive or accept any instructions or agree to any alteration of its agreement with Towle (Exhibit "A" to the Complaint), so as to provide for or require sight draft billing in the future on all shipments of turkey logs contracted to be purchased by Towle under said agreement.

8. Answering Paragraph 17, Defendant denies that at any meeting on August 10, 1954, or at any other time there was any agreement or reaffirmance of any agreement by defendant that all shipments subsequent to July 31, 1954, were to be on a sight draft bill of lading basis.

9. Answering Paragraph 18, Defendant admits that during the period from May 25, 1954, to July

31, 1954, it delivered to Towle or Towle's purchaser, 87,996 lbs. 12 ozs. of turkey logs and that Towle or the partnership owed to Defendant the sum of \$87,166.90 for said poundage and that by, on or about August 10, 1954, Defendant had received the sum of \$92,116.13 in payment for all such poundage and other poundage delivered to August 10, 1954. Further answering said paragraph, Defendant denies each and every remaining allegation contained in said paragraph and denies that as of August 10, 1954, Defendant was or became indebted to Towle or the partnership in the sum of \$4,999.23 or in any sum or amount whatsoever. Further answering said paragraph, defendant alleges that as of August 10, 1954, Towle or the partnership was indebted to Defendant for turkey logs which Towle had agreed to purchase and to pay for, in a sum in excess of \$92,116.13 and that this amount was applied against this indebtedness.

10. Answering Paragraphs 19 and 20, Defendant admits that on or about August 5, 1954, it delivered to Towle or Towle's purchaser, 21,383 lbs., 13 ozs. of turkey logs; that on or about August 16, 1954, it received the sum of \$20,982.81 in payment for said poundage and that said deliveries brought the total poundage thus far delivered to 109,380 lbs., 9 ozs. Further answering said paragraphs, Defendant denies each and every allegation contained in said paragraphs, and denies that on August 16, 1954, it was or became indebted to Towle or the partnership in the sum of \$3,378.53 or the sum of

\$4,231.15 or in any sum or amount whatsoever. Further answering said paragraphs, Defendant alleges that as of August 16, 1954, Towle or the partnership was indebted to Defendant for turkey logs which Towle had agreed to purchase and pay for in a sum in excess of \$20,982.71 and that this amount was applied against this indebtedness.

11. Answering Paragraph 21, admits that on or about August 25, 1954, Defendant delivered to Towle or Towle's purchaser 29,510 lbs., 11 ozs. of turkey logs and that it received the sum of \$30,996.72 in payment for said poundage. Further answering said paragraph, Defendant denies each and every remaining allegation contained therein and denies that on August 25, 1954, it was or became indebted to Towle or the partnership in the sum of \$2,961.57 or in any sum or amount whatsoever. Further answering said paragraph, Defendant alleges that as of August 25, 1954, Towle or the partnership was indebted to Defendant in an amount in excess of \$30,996.72 for turkey logs which Towle had agreed to purchase and pay for and that this amount was applied against this indebtedness.

12. Answering Paragraphs 22 and 23, admits that in addition to the deliveries referred to in the preceding paragraphs of this Answer, Defendant delivered to Towle or Towle's purchaser, turkey logs in the amount of 2,317 lbs., 9 ozs. on August 6, 1954; 70 lbs. 9 ozs. on August 9, 1954; 142 lbs. on August 20, 1954; 34.350 lbs. 5 ozs. on August 20, 1954; 20.845 lbs. 13 ozs. on August 23, 1954, and

925 lbs. 5 ozs. on August 25, 1954, and that on September 17, 1954, it received the sum of \$43,956.83 representing the balance then due and owing by Towle or the partnership to Defendant for all turkey logs sold and delivered to Towle or Towle's purchasers by Defendant. Further answering said paragraphs, denies each and every remaining allegation contained therein and denies that the partnership or Towle were damaged or that Defendant was or became indebted to Towle or the partnership in August, 1954, or at any time in the sum of \$6,711.57 or in any sum or amount whatsoever.

13. Answering Paragraph 24, admits that there has been a demand by Towle for the payment of certain sums, denies that the partnership has made any demands for payment and admits that Defendant has and does now refuse to make any payments to Towle or the partnership.

14. Answering Paragraph 25, denies each and every allegation contained therein, and denies that Defendant is in default in the performance of any contract with Towle or the partnership.

Alternative Claim

15. Answering Paragraphs 27 and 34, Defendant incorporates by reference as though fully set forth herein all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 13 and 14 of the Answer as hereinabove set forth.

16. Answering Paragraph 28, admits that Defendant sold to Towle and that Towle purchased from Defendant 197,722 lbs., 15 oz. of turkey logs for which Towle agreed to pay the sum of \$187,-836.79. Further answering said paragraph, denies each and every remaining allegation contained therein.

17. Answering Paragraph 29, denies each and every allegation contained therein. Further answering said paragraph, alleges that under its contract with Towle, it was not required to remit any sum or amount of money to Towle or to the partnership until it had been paid in full for all turkey logs purchased and agreed to be purchased by Towle under said contract.

18. Answering Paragraphs 30, 31 and 32, admits that as of August 25, 1954, there had been shipped and delivered to Towle or Towle's purchasers, 197,722 lbs., 15 oz. of turkey logs and that Defendant had only been paid the sum of \$144,-095.56 on account of all such turkey logs delivered and that there was then due, owing, payable and unpaid to Defendant by Towle or the partnership for said turkey logs delivered a sum in excess of \$144,095.56 against which this amount was credited and applied. Further answering said paragraphs, Defendant denies each and every remaining allegation contained in said paragraphs. Further answering said paragraphs, Defendant alleges that on September 17, 1954, the sum of \$43,956.83 representing the balance owing to it by Towle or the

partnership for all turkey logs delivered was paid and that at no time was Defendant paid any sum or amounts by any persons which were in excess of the amounts contracted to be paid and then owing to Defendant by Towle or the partnership.

19. Answering Paragraph 33, Defendant denies each and every allegation contained therein and denies that the partnership or Towle have been damaged in the sum of \$22,282.05 or in any sum or amount whatsoever.

As a First Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. Defendant has been paid only such amounts as were due and owing to Defendant by Towle or the partnership under the terms and conditions of the contract entered into between Defendant and Towle for the purchase and sale of turkey logs, said contract being attached to the Complaint herein as Exhibit "A."

As a Second Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. On or about September 17, 1954, it was orally agreed by Plaintiffs and George J. Towle that all of the obligations existing between the parties with regard to the purchase by Towle and the sale by Defendants of turkey logs had been fully and com-

pletely performed, and that in full accord and satisfaction of the obligations of Towle and the partnership to Defendant, and Defendant's obligations to Towle, the sum of \$43,956.83 was paid to Defendant on September 17, 1954.

As a Third, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. The Complaint fails to state a cause of action against Defendant upon which relief can be granted.

As a Fourth, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. On or about August 6, 1954, and in response to the written suggestion of George J. Towle and as an accommodation to him, Defendant agreed that, with regard to turkey logs thereafter delivered to Towle Food Products, Inc., as a purchaser from George J. Towle and which George J. Towle was obligated to purchase and pay for under his agreement with Defendant, it would on behalf of George J. Towle, invoice Towle Food Products, Inc., directly at a price of \$1.05 per pound, representing the purchase price to be paid by Towle Food Products, Inc. to George J. Towle, and that any moneys received would be credited against Towle's indebtedness to Defendant. Defendant further

agreed that as soon as all turkey logs to be purchased by Towle under its contract with Defendant were sold and paid for, any funds remaining would be remitted to Towle Manufacturing Company. Defendant agreed to do this although not required to do so by the terms of its written agreement with Towle.

2. Defendant received no consideration from George J. Towle or the Plaintiffs in connection with or for this agreement.

3. Defendant thereafter as an accommodation to Towle or the partnership invoiced Towle Food Products Co. at Chicago, Illinois, directly for all deliveries of turkey logs made to it at a price of \$1.05 per pound. Although demand was made, Towle Food Products Co. failed and refused to pay such invoices in full and paid to Defendant only such total amount as was equal to the sums due and owing to Defendant from George J. Towle or Towle Manufacturing Company, the partnership, at a price of 95 cents per pound as set forth in the agreement between Defendant and George J. Towle. Defendant is advised and upon information and belief alleges that Towle Food Products, Inc.'s failure to pay the additional sums as invoiced was upon the basis that it has and claims a valid and legal defense against any additional amounts demanded from it by George J. Towle or Towle Manufacturing Company, the partnership, and that it has paid to Towle and the partnership all sums due and owing to them.

4. Defendant alleges that, if any sums or amounts are due and owing to Plaintiffs for said turkey logs, such amounts are owing by others than Defendant. Defendant is informed and believes that Plaintiffs have endeavored to recover the sums herein claimed from Towle Food Products, Inc., and have thereby acknowledged their claims to be one only as against Towle Food Products, Inc.

As a Fifth, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. Defendant incorporates herein by reference, as though fully set forth herein, all of the allegations contained in Paragraphs 1, 2, 3 and 4 of its Fifth Affirmative Defense as above set forth.

2. The action is barred by the statutes of fraud, being Section 25-5-4 (2) Utah Code Annotated, 1953, which provides as follows:

“25-5-4. Certain agreements void unless written and subscribed—In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: * * * (2) Every promise to answer for the debt, default or mis-carriage of another.”

Wherefore, Defendant prays that Plaintiffs' Complaint herein be dismissed and that Defendant be awarded its costs of suit, together with reason-

able attorneys' fees and such other and further relief as to the Court may seem proper.

GARFIELD O. ANDERSON,
EDWARD J. RUFF,
THELAN, MARRIN, JOHN-
SON & BRIDGES,

By /s/ EDWARD J. RUFF,
Attorneys for Defendant.

Of Counsel:

HARRY D. PUGSLEY,
PUGSLEY, HAYES & RAMPTON.

[Endorsed]: Filed October 2, 1956.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

This is an action for an alleged breach of an agency agreement. From the evidence the Court concludes that the defendant did not violate its understanding with plaintiff. The evidence that credit could not be extended by the agent was ambiguous, and therefore not persuasive. From all of the evidence the Court concludes that defendant had authority, either express or implied, to act as it did.

Judgment, therefore, is awarded to defendant with costs.

Counsel for defendant shall prepare and present findings, conclusions and a judgment.

Dated: July 3, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed July 7, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on June 4, 1958, before the Court sitting without a jury, all parties being present and represented by counsel, and both sides having completed their presentation of oral and documentary evidence with respect to the issues herein, and the Court having heard and considered the oral and written arguments of and authorities cited by counsel for the respective parties, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiffs George J. Towle and Fred George are residents and citizens of the State of California, and plaintiff Towle-George Turkey Log Company,

also known as Towle Food Products Co. (hereinafter referred to as "the partnership"), is a partnership composed of George J. Towle and Fred George and doing business in the State of California.

II.

Defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Utah.

III.

On May 25, 1954, George J. Towle, acting for and on behalf of the partnership, agreed in writing (Pl. Ex. 4) to purchase approximately 190,000 pounds of turkey logs from defendant in lots of 10,000 pounds or more at a price of 99 cents per pound to be paid upon taking delivery and to purchase and pay for the entire amount of these turkey logs on or before August 1, 1954; after 100,000 pounds had been delivered and paid for, the partnership was to receive a credit of 4 cents per pound on these 100,000 pounds and the balance of the approximately 190,000 pounds was to be paid for at 95 cents a pound.

IV.

On June 10, 1954, the partnership agreed in writing (Pl. Ex. 6) with Turkey Log Corporation of Illinois, an Illinois corporation (hereinafter referred to as "the Illinois corporation"), to sell all of the turkey logs, which it was purchasing from defendant, to the Illinois corporation f.o.b. Chicago in minimum quantities of 10,000 pounds at a price of \$1.05 per pound to be paid at the time of taking

delivery, with the entire purchase price payable on or before August 1, 1954.

V.

Thereafter and up to August 10, 1954, plaintiffs issued instructions to defendant with regard to shipments to be made by it to the Illinois corporation or its purchasers, invoiced the Illinois corporation for such shipments on open account, except in those instances where the Illinois corporation specifically requested that shipment be made sight draft bill of lading, and from time to time received payments from the Illinois corporation on the basis of such invoices or sight drafts. As each shipment was made by defendant on orders from the partnership, defendant invoiced the partnership and received payments from it on the basis of such invoices or in some cases directly from the consignee where the Illinois corporation had specifically requested sight draft shipment. Defendant in all instances followed plaintiffs' instructions with regard to shipments and billing.

VI.

On or about July 22, 1954, George J. Towle on behalf of the partnership inquired of defendant whether it would be willing to make shipments for the account of the partnership of the balance of the turkey logs directly to the Illinois corporation on the basis of orders issued directly to defendant by the Illinois corporation. to invoice the Illinois corporation direct on the basis of \$1.05 a pound

f.o.b. Chicago with payments to be made direct to defendant and defendant crediting the partnership's account on the basis of 99 cents per pound and with the 95-cent-per-pound retroactive figure to be credited at the proper time. This inquiry was made by Towle because he was leaving for Europe and it would be more convenient for him to have the matter handled in this way and have the Illinois corporation pay defendant direct during his absence rather than to have the Illinois corporation paying plaintiffs on the basis of invoices issued by plaintiffs and plaintiffs paying defendant on the basis of invoices issued by defendant to plaintiffs. It is not true that on or about this date any arrangement was changed as between plaintiffs or any of them and defendant.

VII.

On or about August 6, 1954, defendant for the first time advised plaintiffs that it would be willing, on behalf of the partnership, to make shipments of the balance of the turkey logs to the Illinois corporation direct, to bill the Illinois corporation at \$1.05 a pound, and to credit the partnership's account with defendant with the difference. Defendant at the same time advised the partnership that the entire amount of approximately 190,000 pounds of turkey logs had not then been delivered and paid for in accordance with the Agreement of Sale and that unless this was done by August 10, 1954, there would be no alternative but to request cancellation of the Agreement. It is not true that prior to August 6, 1954,

or at any time plaintiffs or any of them gave instructions to defendant that shipment of turkey logs to the Illinois corporation should be made only on a sight draft payable to Norbest or that on August 6, 1954, or at any time defendant acknowledged any such instructions.

VIII.

Thereafter a meeting was arranged between plaintiffs, defendant and a representative of the Illinois corporation in Salt Lake City, Utah, on August 9 and 10, 1954, and it was orally agreed between plaintiffs, defendant and the Illinois corporation that transfer of the remaining turkey logs would be made by defendant, acting on behalf of the partnership, directly to the Illinois corporation on the basis of orders issued by the Illinois corporation and that defendant would invoice the Illinois corporation directly for them at \$1.05 per pound; that the Illinois corporation would pay in full for said turkey logs by August 25, 1954; and that after all of the approximately 190,000 pounds of turkey logs had been sold and defendant had been paid for them in full, any credit which was then accrued to the partnership would be paid by defendant to the partnership. At this time plaintiffs had not taken delivery and paid for 100,000 pounds of the turkey logs and under the terms of plaintiffs' contract with defendant the entire amount for the approximately 190,000 pounds of turkey logs purchased by plaintiffs was due, owing and payable. It is not true that at this or any other

time defendant agreed or reaffirmed that all shipments were to be on a sight draft bill of lading basis only.

IX.

Defendant thereafter as agent for the partnership, and in accordance with its agreement with and instructions from the partnership and plaintiffs and not in violation of any of them, made transfers directly to the Illinois corporation on or before August 25, 1954, of the entire balance of the approximately 190,000 pounds of turkey logs purchased from defendant by the partnership and transmitted invoices or sight drafts directly to the Illinois corporation in connection with these transfers at \$1.05 per pound. All of such shipments or transfers were made in approximately the same manner as and followed approximately the same practice as plaintiffs had followed in making previous shipments or transfers from plaintiffs to the Illinois corporation. Defendant thereafter received from the Illinois corporation on account of such transfers moneys which it credited against the total amount owing to defendant by plaintiffs and the partnership for such turkey logs.

X.

It was not agreed between plaintiffs or any of them and defendant that defendant would, and at no time did plaintiffs or any of them instruct defendant to, ship or transfer the turkey logs to the Illinois corporation only on a sight draft bill of lading basis or only on a basis that would not involve the extension of any credit to the Illinois corpora-

tion, or in any manner inconsistent with or different from the manner in which defendant actually shipped said turkey logs. At no time did defendant deliver any turkey logs to the Illinois corporation in any manner which was in violation of or inconsistent with its agency for, or any instructions received by it from, plaintiffs or any of them or in violation of or inconsistent with any understanding and agreement between defendant and plaintiffs or any of them.

XI.

The Illinois corporation refused to pay to defendant the entire amount for which it had been invoiced and paid to defendant an amount sufficient only to make the total amount which defendant had received from all sources equal to the amount due from the partnership to defendant at a rate of 95 cents per pound. At no time did defendant receive from the Illinois corporation for said turkey logs or have in its possession at any particular time from any source any sum or amounts of money in excess of the amounts then owing to defendant for turkey logs purchased by plaintiffs or in excess of the total amount owing to defendant by plaintiffs at a rate of 95 cents per pound for the 197.722 pounds, 15 ounces of turkey logs purchased from defendant by the partnership. No credit at any time ever accrued to the plaintiffs for which a proper allowance has not been made.

Conclusions of Law

I.

This court has jurisdiction of this cause of action.

II.

This court has jurisdiction of the parties.

III.

Defendant agreed to act as the gratuitous agent for plaintiffs for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois.

IV.

Defendant did not violate any of the terms of any understanding or agreement with plaintiffs either oral or written with regard to this agency and had full authority, express or implied, to act as it did with regard to this agency.

V.

No credits ever accrued in favor of plaintiffs or any of them out of any moneys held or received by defendant in excess of the amounts owing by plaintiffs to defendant, and there never was and there is not now owing any sum of money from defendant to plaintiffs in connection with any of the transactions which were the subject of this action.

VI.

Defendant Norbest Turkey Growers Association is entitled to have and recover judgment in its favor and to recover its costs herein as against plaintiffs.

Dated: San Francisco, California, this 12th day of September, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Not approved as to contents, but approved as to form as provided in Rule 21 of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ CARL HOPPE,
One of the Attorneys for
Plaintiffs.

Lodged August 12, 1958.

[Endorsed]: Filed September 12, 1958.

In the United States District Court for the
Northern District of California, Southern Division
Civil No. 35653

GEORGE J. TOWLE and FRED GEORGE, Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY, Also Known as TOWLE FOOD PRODUCTS CO., a Co-partnership,

Plaintiffs,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a Corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial on June 9, 1958, before the Court sitting without a jury, all parties being present and represented by counsel, and both sides having completed their presentation of oral and documentary evidence with respect to the issues herein, and the Court having entered its Findings of Fact and Conclusions of Law dated September 12, 1958, and the Court having concluded that the plaintiffs shall take nothing by reason of their complaint and that judgment shall be entered for defendant:

It Is Therefore Ordered and Adjudged that:

I.

Plaintiffs George J. Towle and Fred George, in-

dividually and as copartners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, shall take nothing by reason of their complaint.

II.

Judgment is hereby awarded to defendant Norbest Turkey Growers Association against said plaintiffs.

III.

Defendant shall have and recover its costs as against plaintiffs and each of them, herein and to be hereinafter taxed on notice and herein inserted by the Clerk of this Court in the sum of \$244.55.

Dated: San Francisco, California, this 12th day of September, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Not approved as to contents, but approved as to form as provided in Rule 21 of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ CARL HOPPE,
One of the Attorneys for
Plaintiffs.

Lodged August 12, 1958.

[Endorsed]: Filed September 12, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

George J. Towle and Fred George, individually and as co-partners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, plaintiffs in the above-entitled cause, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 15, 1958.

GEORGE J. TOWLE,
FRED GEORGE,
TOWLE-GEORGE TURKEY
LOG COMPANY,

By /s/ CARL HOPPE,
One of Their Attorneys.

[Endorsed]: Filed October 15, 1958.

United States District Court, Northern District of
California, Southern Division

No. 35,653

TOWLE, et al.,

Plaintiff,

vs.

NORBEST TURKEY GROWERS ASSN.,

Defendants.

Honorable Oliver J. Carter, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

CARL HOPPE, ESQ.

For the Defendants:

MESSRS. THELEN, MARRIN, JOHN-
SON & BRIDGES, by

EDWARD J. RUFF, ESQ.,

MESSRS. PUGGSLEY, HAYES &
RAMPTON, by

HARRY D. PUGGSLEY, ESQ.

The Clerk: Towle, et al., versus Norbest Turkey Growers for trial.

Mr. Hoppe: Ready for the plaintiff.

Mr. Ruff: Before we proceed, I should like to request admission for the purpose of this case of Mr. Harry Puggsley, a member of the Bar of Salt Lake City.

The Court: All right. Mr. Puggsley will be admitted for the purpose of this case and for all proceedings in this case to appear on behalf of the defendant.

Mr. Ruff: Yes, your Honor.

The Court: Gentlemen, at the outset, I know the Complaint alleges jurisdictional facts, that the plaintiffs are residents of the State of California or citizens of the State of California, and the defendant is a citizen of Utah. Is there going to be any question as to diversity of jurisdiction?

Mr. Ruff: No, your Honor.

The Court: I know that no issue is raised, and you can't stipulate to the jurisdiction of the Court, but you can stipulate to the citizenship of the parties.

Mr. Ruff: That is correct.

The Court: And you will stipulate that the allegations made in the Complaint are true in that respect, then?

Mr. Ruff: Yes, your Honor.

The Court: All right. Then no proof will be [4*] required on that issue.

Mr. Hoppe: Thank you, your Honor. [5-24]

* * *

Mr. Hoppe: Plaintiffs' Exhibit 1 is the General Partnership Agreement of the Towle-George Turkey Log Corporation.

* * *

•Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit 2 is an Assignment of Interest in Royalties, dated June 1, 1953; and Plaintiffs' Exhibit 3 is an Amendment to the Assignment of Interest in Royalties.

The Court: They will be admitted into evidence as Plaintiffs' Exhibits 1, 2 and 3, if there is no objection.

Mr. Ruff: No, your Honor. [25]

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 4, we offer in evidence the Sales Agreement between Norbest Turkey Growers Association and George Towle, dated May 25, 1954. As Plaintiffs' Exhibit 5, we offer in evidence a Sales Agreement between Norbest Turkey Growers Association and the Turkey Log Corporation of Illinois, dated May 25, 1954.

* * *

As Plaintiffs' Exhibit 6, we offer in evidence an Agreement between Fred George and George J. Towle, co-partners doing business under the firm name and style, Towle Food Products Co., and the Turkey Log Corporation of Illinois, dated June 10, 1954. As Plaintiffs' Exhibit 7, we offer in evidence an Agreement between Fred George and George J. Towle, as co-partners doing business under the name and style of Towle Food Products Co. and Turkey Log Corporation of Illinois, also dated June 10, 1954. [26]

* * *

The Court: * * * They will be admitted into evidence as Plaintiffs' Exhibits 4, 5, 6 and 7.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 8, we offer in evidence a copy of a letter dated July 22nd, 1954, from Towle Manufacturing Co. to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 8 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 9, we offer in evidence a letter dated July 30, 1954, from Norbest Turkey Growers Association to Mr. George Towle. Towle Manufacturing Co., Inc. [27]

* * *

As Plaintiffs' Exhibit 10, we will offer in evidence a letter. a copy of a letter. dated August 3, 1954, from Towle Manufacturing Co. to L. E. Hart.

The Court: Plaintiffs' Exhibits 9 and 10 will be admitted into evidence.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 11, we offer in evidence a letter dated August 3, 1954, from Towle Manufacturing Co. to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 11 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 12, we offer in evidence a letter dated August 6, 1954, from Norbest Turkey Growers Association to Mr. George Towle, Towle Manufacturing [28] Co., Inc.

The Court: Plaintiffs' Exhibit 12 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 13, we offer in evidence a copy of a letter dated August 10, 1954, from Norbest Turkey Growers Association to Mr. A. Adams, Vice-President, Towle Food Products Co.

* * *

The Court: It will be admitted into evidence as Plaintiffs' Exhibit 13.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 14, we offer in evidence a copy of a letter from Norbest Turkey Growers Association to Fred George. [29]

* * *

As Plaintiffs' Exhibit 15, we offer in evidence a copy of a letter dated September 28, 1954, from Norbest Turkey Growers Association to Mr. Clarence E. Betz, Towle Manufacturing Company, Inc.

I have got another document attached to this, and as Plaintiffs' Exhibit 16, we offer in evidence the Statement of Account, dated September 21, 1954, attached to said copy of the letter.

The Court: Plaintiffs' Exhibits 14, 15 and 16 will be admitted into evidence. [30]

* * *

As Plaintiffs' Exhibit 17, we offer in evidence a copy of a letter dated September 24, 1954, from Towle Manufacturing Company to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 17 will be admitted into evidence. [31-32]

* * *

Mr. Hoppe: * * * As Plaintiffs' Exhibit 18, we offer in evidence a letter dated August 16, 1954, from Norbest Turkey Growers Association to the Kansas Cold Storage Co. together with the attached invoice; and as Plaintiffs' Exhibit 19, we offer in evidence a group of invoices totalling 14 pages.

The Court: All right. Plaintiffs' Exhibits 18 and 19 will be admitted into evidence. [33-34]

* * *

FRED GEORGE

called as a witness by the plaintiff, being first duly sworn, thereupon testified as follows:

* * *

Direct Examination

By Mr. Hoppe:

Q. Mr. George, you are one of the plaintiffs in this case? A. That is right.

(Testimony of Fred George.)

Q. And you are a resident of the State of California? A. I am. [35]

* * *

Q. Mr. George, what is a turkey log?

A. * * * I will say turkey log was a name given a boned turkey product. The turkey is boned. The meat is cast into cylindrical form under pressure and is formed in the shape of a log.

Q. About how much does a turkey log weigh? What is its rough size?

A. Its rough size is 15 inches in length, approximately 4 and a half inches in diameter, and it weighs approximately 9 pounds.

Q. Do you know any of the officers of the Norbest Turkey Growers Association?

A. Yes; I do.

Q. Would you name some of the officers whom you do know?

A. The two that I know are Mr. Beyers, general manager, and Mr. Garrett; and that is all I think I know at the present time. I don't know their present president or vice-president. [36]

* * *

Q. Did you meet with any of the officers of Norbest Turkey Growers Association in August of 1954? A. Yes.

Q. Where was that meeting?

A. In Salt Lake City.

Q. Do you know when in August it occurred?

(Testimony of Fred George.)

A. I met Mr. Beyers the evening of August the 9th, and again on August 10th.

Q. Was anyone else in Salt Lake City at the meeting with you during that period of time, and, if so, would you state their names?

* * *

A. Mr. Towle was the evening of the 9th; Mr. Adams of the Chicago group was with us the evening of the 9th. On the morning of the 10th, it was Mr. Adams of the Chicago group and myself. Mr. Towle was not present.

Q. Do you recall any conversations at which one or more of those persons whom you have mentioned was present during that period of time in which the question of the payment by the Chicago group for the turkey logs was discussed? [37]

* * *

A. There was conversation with Mr. Adams and Mr. Beyers regarding payment on the evening of the 9th at which I was present.

Q. What is the first conversation you can recall?

A. Well, the first conversation that I can recall regarding payment took place in the evening of the 9th, but it was between Mr. Towle and myself.

Q. Who was present?

A. No one. [38-42]

* * *

Q. (By Mr. Hoppe): Mr. George, do you recall any conversations on August 9 or August 10

(Testimony of Fred George.)

at which the question of payment for the turkey logs to be delivered after that date was discussed and at which there was present a representative of Norbest Turkey Growers Association?

A. Not on the 9th. [43]

Q. No. I said on the 9th and 10th, during that period.

A. On the 10th. I don't know that you could call it a discussion. Mr. Adams——

Q. Who was present, first, at the conversation?

A. Mr. Adams, Mr. Beyers, and myself.

Q. Where did that meeting or discussion or conference or whatever we want to call it take place?

A. In the office of Mr. Beyers, Norbest Turkey Growers Association.

Q. In Salt Lake City? A. That is right.

Q. And what occurred at that meeting?

A. Mr. Adams had received in the morning mail a check in the amount of over \$50,000. It had been mailed from Chicago to Mr. Adams at the Hotel Utah.

Q. Mr. George, I wish you would limit your testimony to what occurred at this meeting.

A. All right. What occurred at the meeting was——

Q. Yes?

A. Mr. Adams and I went to Mr. Beyers' office. Mr. Adams gave Mr. Beyers the check.

Q. In what approximate amount?

A. It was a little over \$51,000. I don't recall the exact amount. Mr. Adams countersigned the

(Testimony of Fred George.)

check and passed it to Mr. Beyers, making a [44] remark.

Q. That is?

A. Meaning, or to the effect that in his opinion that about brought him up to date.

The Court: Who said that, Mr. Adams?

The Witness: Mr. Adams.

Q. (By Mr. Hoppe): And who was it that brought up to date?

A. The Hart group.

Q. Was anything said during that conversation about the delivery or payment of the balance of the turkey logs which were still in stock?

A. Yes. Mr. Beyers told Mr. Adams that on future deliveries there would be sight draft bill of lading.

Q. Do you recall whether Mr. Adams, in the course of this conversation, made any comments along the lines of payment?

A. The comment Mr. Adams made was that that could be handled because they had just completed their own financing arrangements in Chicago.

Q. Can you recall any other conversation along the line of payment for future delivery of the turkey logs which occurred at that time?

A. I don't recall any further conversation.

Mr. Hoppe: That is all. [45]

(Testimony of Fred George.)

Cross-Examination

By Mr. Ruff:

Q. Mr. George, you did not handle any of the financial arrangements of this partnership between yourself and Mr. Towle, did you?

A. No; I did not.

Q. In other words, all of the financial arrangements, the manner of shipment, the manner of payment for the logs, the manner of transactions as between your partnership and Norbest or between your partnership and the Chicago Corporation, all those were handled by Mr. Towle?

A. That is correct.

Q. Your only relationship to the matter was in a sales capacity; is that correct, basically?

A. Well, basically, our general partnership agreement under a paragraph in there called "Duties of the Partners." Mr. Towle was to devote the major portion of his time to sales. I was to devote the major portion of my time to the procurement or manufacture of the product.

Q. I see. But, in fact, Mr. Towle handled all the financial matters?

A. That is correct.

Q. In other words, if an arrangement were to be made between your partnership and Norbest with regard to some duties of Norbest, and I am talking now about agency, that would be [46] made by Mr. Towle? A. Yes.

(Testimony of Fred George.)

Q. And you would have nothing to do with that? A. No, sir.

Q. And by the same token, if arrangements were made between your partnership and the Chicago Corporation with regard to the method of payment and that type of thing, that would be handled by Mr. Towle, and you would have nothing to do with that? A. That is correct, sir.

Q. It is the fact, is it not, that the method of handling that was followed here up to August the 10th or thereabouts was that the Norbest people would receive orders from your organization for shipment to various points; is that correct?

A. Generally, yes.

Q. And you would have in turn received those orders from Chicago after Chicago became interested in the product?

A. Likewise, generally that is the way it was intended to be.

Q. And, had you had anything to do with the arrangements that were made with the Chicago people, and I am referring specifically now to the contract that was entered into between your organization and the Chicago group, which has been introduced in evidence here as Plaintiff's Exhibit 6? [47]

* * *

A. Yes. I sat in on those negotiations leading to this contract.

* * *

(Testimony of Fred George.)

Q. And by the same token, you had to do with and were familiar with any negotiations which led to the sales agreements between Norbest and George Towle? A. Yes; I am.

Q. Now, this agreement—that has been introduced in evidence as Plaintiffs' Exhibit 4—this agreement between Norbest and George Towle was entered into in Salt Lake City in May of 1954, on or about the 25th; is that correct?

A. That is correct.

Q. At or about the same time, discussions were had, were they not, with Mr. Hart of the Chicago group making the arrangements which ultimately led to this agreement of June 10, introduced in evidence as Plaintiffs' Exhibit 6? In other words, you had discussions of whatever future arrangements were [48] going to be made with Chicago, did you not? A. That is correct.

* * *

Q. * * * I notice that in the sales agreement between Mr. Towle and the Norbest people it provided for a sales price of 99 cents per pound for 190,000 pounds with the further provision that after 100,000 pounds have been withdrawn from storage and paid for, the price would be reduced to 95 cents, retroactive on the whole amount of shipment; is that correct?

A. That is correct.

Q. Were you familiar with that?

A. I was. [49]

* * *

(Testimony of Fred George.)

Q. Mr. George, how was that meeting arranged in Salt Lake City?

A. Which meeting do you refer to, Mr. Ruff?

Q. The one you have testified to on your direct examination.

A. You mean the August meeting?

Q. Yes.

A. Yes. As I recall, I first learned that the meeting was contemplated through Mr. Towle.

Q. Yes? [50]

A. And I am not clear as to whether Mr. Towle had been advised—I believe he had been advised by the Chicago group that it might be well to have another meeting.

Q. I see.

A. And whether or not there were confirming letter—or, it could have been handled by telephone. As I recall, Mr. Towle advised me that he was stopping off in Salt Lake City on his way to New York and would be there on the 9th and wanted to know if I would be there.

Q. Is it the fact that at this time Mr. Towle was in default under his contract to Norbest because the total amount of shipments called for under his contract had not been taken; isn't that correct?

A. Well, the record would so show that, I think.

Q. Yes. At this time, at this point in time, Mr. Towle was in default under his contract?

A. I think that is correct.

Q. Now, the meeting that was had in * * * Salt

(Testimony of Fred George.)

Lake City, I assume was primarily directed toward the point of making some arrangements because Mr. Towle had made plans to vacation in Europe for a period of time; isn't that correct?

A. I think that was the main reason.

Q. In other words, it was his desire to make some [51] arrangements for the merchandising of this material while he was gone; isn't that correct?

A. I think that is correct.

Q. In that connection and with regard to the handling of the material or the method of shipment or payment, you had never used the sight draft or sight draft bill of lading from the partnership to Chicago, had you?

* * *

A. Not to my knowledge.

Q. Up to this point in time there had never been sent from the Towle organization in San Francisco to the Hart organization in Chicago any sight draft or sight draft bill of lading? It was all handled on invoice?

A. That is my understanding.

Q. Except for a few instances where the Chicago organization had specifically requested a sight draft to a third party customer? That had happened, hadn't it?

A. Yes. I think that had happened.

Q. In other words, in some instances, the Chicago organization, who was your buyer, so to speak, had requested a sight draft, for instance, to an

(Testimony of Fred George.)

organization in Independence, Missouri, or Wichita, Kansas, where a shipment was being made directly to them, and they had specifically requested a [52] sight draft; that is right, isn't it? A. Yes.

Q. And you then, in turn, passed down this order to Norbest, who followed that instruction as to those specific orders? A. Yes.

Q. Now, in this conversation that you had in Salt Lake City, isn't it a fact that the discussion that was had with regard to the sight draft bill of lading related to future shipments of that type, in other words, to third parties, and it was not concerned with shipments that were to be made directly to Chicago?

* * *

A. Well, the conversations, just as I can recall it, is just as I gave it to you awhile ago, that when Mr. Adams gave Mr. Beyers the check with the remark that he thought that just about balanced the account, Mr. Beyers, I think, sent the check out to the accounting department. The information came back, and Mr. Beyers said that he was glad to get it, and that from now on the shipments will be SDBL.

Q. The shipments would be made SDBL. Now, part and parcel of this arrangement that you made in Salt Lake City at this time contemplated the Chicago group taking over the [53] entire remaining inventory in the warehouse, did it not?

A. Yes.

(Testimony of Fred George.)

Q. In other words, that was the purpose of the meeting? Mr. Towle was in default under his contract, as you have stated, and as you may recall from some of the letters that were sent; and I particularly refer you to a letter, Plaintiffs' Exhibit 9, dated July 30, from Mr. Beyers to Mr. Towle. It states in there:

"I hope that the money on the turkeys now billed will be into us early next month. I would suggest that if the turkey logs are not all billed by the 10th that they be transferred over, and we will bill them to you."

Now, Mr. Towle wanted to make some arrangement so that this wouldn't happen while he was gone. That is true, isn't it? A. That's right.

Q. And, so the intent and purpose of this meeting was to arrange for a complete transfer of this inventory in the warehouses from the Norbest people over to the Chicago group? Now, that is what was intended, was it not?

A. Well, I had nothing to do with the negotiations, and I can only pass judgment on this. I haven't seen that letter until this case came up here.

Q. You mean you haven't seen it until [54] today?

A. I saw it just a few days ago after I reached California. I never saw it before then.

* * *

Q. Now, so I may have your language clear, you say that Mr. Beyers told Adams that on future

(Testimony of Fred George.)

deliveries there would be sight draft bill of lading; is that correct?

A. It would be a SDBL basis.

Q. Did he say future deliveries to Chicago directly?

A. I don't think that was said directly. In other words, what he said was that on future deliveries there would be sight draft bill of lading, [55] SDBL

* * *

Redirect Examination

By Mr. Hoppe:

Q. Mr. George, with regard to your testimony concerning the duties which you had for the partnership, before this meeting which you had with Mr. Adams and with Mr. Beyers on the 10th, before that meeting, had Mr. Towle given you any instructions as to what should be done at the meeting with regard to payment for the turkey logs?

Mr. Ruff: Object to that on the same grounds. It is hearsay, so far as any instructions given by Mr. Towle to Mr. George.

Mr. Hoppe: He opened it, your Honor, when he went into the duties which Mr. George had.

Mr. Ruff: If the Court please, my examination of the witness was with regard to his general familiarity, business background, and so forth, not in regard to this limited issue of instructions given by Mr. Towle to him as to this meeting.

(Testimony of Fred George.)

Mr. Hoppe: You asked him about that, counsel. You asked: In your duties for the partnership, Mr. Towle handled all of the financial matters. So, you opened up this line of testimony.

Mr. Ruff: I will submit the matter to your Honor.

The Court: I don't see that he particularly opened up [56] this line. I know the testimony, Mr. Hoppe, but my inclination would be to sustain the objection as it presently stands, but I realize that in the question of redirect examination, any field that is opened by cross is opened for you to go farther, but I don't see that that phase of it is opened.

Mr. Hoppe: Well, I may ask the question under Rule 43, your Honor. It won't be very long.

The Court: This witness is your own witness. He is not adverse.

Mr. Hoppe: No. Under Rule 43, objected testimony may be received for the purpose of making a record.

The Court: All right. Go ahead.

Mr. Hoppe: The following questions are submitted under Rule 43:

Q. Mr. George, before this meeting on June 10, had Mr. Towle given you any instructions with regard to the payment of future deliveries of the turkey logs?

A. You mean on August 10?

Q. August 10th. Pardon me.

A. He had not given me any specific instruc-

(Testimony of Fred George.)

tions. None, I think, until the evening of the 9th. The evening of the 9th of August, he did.

Q. What were the instructions you were given on the evening of the 9th?

A. They were given me by Mr. Towle after he had determined [57] that he would not be present, definitely determined that he would not be present for the meeting of the morning of the 10th.

* * *

Q. Would you go on, Mr. George?

A. Mr. Towle called me in my room and said that he had received the weather report and that he and Mrs. Towle would be taking off early the next morning, that he would not be in the meeting with Mr. Beyers; and, as I recall, he asked me to come down to his room, and his instructions to me were that after the check was received which Mr. Adams had indicated to both Mr. Beyers and Mr. Towle, as I understand it, was in the mail, after that check was received that I was to make sure that there was an understanding that the balance of the inventory would be handled on an SDBL basis.

Mr. Hoppe: That is all. That is the end of my redirect examination.

The Court: Any further cross-examination?

Mr. Ruff: One question, your Honor.

(Testimony of Fred George.)

Recross-Examination

By Mr. Ruff:

Q. In your direct testimony, you related that the conversation which took place in your meeting of August 10th [58] in Mr. Beyers' office, at which time Mr. Adams was present was as follows: You said that Mr. Adams and Mr. Beyers were in there with you, that Mr. Adams had received a check of over \$50,000, that he gave it to Mr. Beyers, stating that it would about bring them up to date in his opinion; that Mr. Beyers then sent the check out and that Mr. Beyers then told Mr. Adams that on future deliveries there would be sight draft bill of lading, and that Mr. Adams said that he thought that could be handled because they had just completed financing in Chicago. Now, that was your direct testimony with regard to the conversation at that meeting? A. Yes.

Q. That is to the best of your present recollection all of the conversation that took place at that meeting; is that correct?

A. The only other conversation that took place was very short in regard to Mr. Adams' request, I believe, for some letters to be written and Mr. Beyers dictated the letters.

Q. You said nothing at that time about any sight draft bill of lading?

A. No, sir. I didn't. [59-61]

Afternoon Session, 1:30 o'Clock P.M.

* * *

GEORGE J. TOWLE

called as a witness by the plaintiffs, being first duly sworn, thereupon testified as follows:

* * *

Direct Examination

By Mr. Hoppe:

Q. Mr. Towle, you are one of the plaintiffs in this action? A. Yes.

Q. And you are a citizen of the State of California? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibits 6 and 7 and ask if you are one of the partners of the partnership referred to in that agreement?

A. Yes; I am.

Q. And I hand you Plaintiffs' Exhibit 4, and I ask if you are the George Towle referred to in that agreement? [62] A. Yes; I am.

Q. Referring to Plaintiffs' Exhibit 4, would you tell us whether that contract was entered into by you on your own personal behalf or on behalf of the partnership represented by Plaintiffs' Exhibits——

* * *

6 and 7.

* * *

A. Yes. I was acting in behalf of the partnership.

(Testimony of George J. Towle.)

Q. Mr. Towle, have you heard Mr. Fred George's testimony about the meeting in Salt Lake City on August 9th and 10th of 1954?

A. Yes; I did. [63]

* * *

Q. During that period of time, do you recall any instructions which you may have given Fred George concerning the payment of future deliveries of turkey logs? A. Yes.

Q. Would you please state the facts and circumstances of the instructions which you gave to Mr. George?

Mr. Ruff: If the Court please, I object to the question on the same grounds previously given with regard to the same—to Mr. George, on the ground it is hearsay.

The Court: Is this again one of the *res gestae* offers?

Mr. Hoppe: No. This is on the fact that in the defendants' cross-examination of Mr. George, they went into the duties which Mr. George had at this meeting on the 10th, and since the only person who could—the only way that the duties can be determined is by knowing what the relationship between the parties actually is, that in my opinion would be an exception to the hearsay rule.

Mr. Ruff: If your Honor please, that is the same [64] matter which we discussed before. That question of Mr. George was not with regard to what duties he had at that meeting of August 10th.

(Testimony of George J. Towle.)

I questioned him generally with regard to his relationship to the organization. This question seeks to do by indirection what cannot be done directly.

The Court: I think it is hearsay. I will have to sustain the objection.

Mr. Hoppe: May I have the answer under Rule 43, please?

* * *

The Witness: I had given Mr. George instructions, I guess you would say, or authority to speak to Mr. Adams. The next morning, that is the morning of the 10th, we had planned on leaving early. I didn't know whether—I didn't except to see Mr. Adams the next morning, because we were leaving immediately for the East, and I told Mr. George that when the check came in from Chicago that he should at that time inform Mr. Adams that future shipments would be on sight draft.

Mr. Hoppe: These, again, are under Rule 43-C, your Honor. [65]

The Court: Yes.

* * *

Mr. Hoppe: * * * Were you present at any time that such information concerning the sight draft was communicated to Mr. Adams?

Mr. Ruff: By Mr. George?

The Witness: By Mr. George?

Mr. Hoppe: By anyone.

A. By someone, yes.

(Testimony of George J. Towle.)

Q. When was that?

A. That was the next morning at breakfast.

Q. And who communicated this information to Mr. Adams? A. I did.

Q. What did you tell Mr. Adams?

A. After he showed me the check, I told him that we were very glad to have it, and that from now on, in the future, it would be paid—it must be paid for on sight draft.

Mr. Hoppe: And now I am going back off of Rule [66] 43-C, your Honor.

Q. Did you see Mr. Herb Beyers during the two-day period of August 9 and August 10 of 1954?

A. Yes; I did. [67]

* * *

Q. What time did you get to Salt Lake?

A. It was early in the afternoon of the 9th.

Q. When did you leave Salt Lake City?

A. We left about 9:00 o'clock on the morning of the 10th.

Q. During the period beginning in the morning on the 9th and ending in the morning on the 10th, did you make at any time during that period any statement to Mr. Beyers giving him—saying that he might extend credit to Towle Food Products Company or words to that effect? [68]

* * *

The Witness: Not that I recall.

Q. (By Mr. Hoppe): When did you first learn that Mr. Beyers or the defendant Norbest Turkey

(Testimony of George J. Towle.)

Growers Corporation did [69] extend credit to the Towle Foods Products Company?

A. About the 22nd of October. * * * 1954.

Q. * * * did you have any conversations with anybody of Norbest Turkey Growers Association or have any correspondence with them between August 10th and October 24th?

A. No. No contact.

Q. I note that the name of your company on some of these invoices is given as the Towle Manufacturing Company, and that there is a company in Chicago by the name of Towle Food Products Company. Would you state the identity of those two concerns?

A. The Towle Manufacturing Company is my own corporation in Walnut Creek, and the Towle Food Products Company is an Illinois corporation. That is the Hart group.

Q. And that is the name of the corporation that was once known as the Turkey Log Corporation?

A. Yes.

* * *

Mr. Hoppe: Your Honor, we offer in evidence as Plaintiffs' Exhibit 16-A—we are taking this out of order [70] so it will appear in a logical place—a statement of account of Towle Manufacturing Company dated September 21, 1954.

* * * prepared by Norbest Turkey Growers Association.

* * *

(Testimony of George J. Towle.)

The Court: It will be admitted into evidence as Plaintiffs' Exhibit 16-A.

* * *

Mr. Hoppe: Plaintiffs rest, your Honor. [71-80]

* * *

GEORGE TOWLE

recalled as an adverse witness by the defendants, having previously been duly sworn, thereupon testified as follows:

The Court: He is being called as an [81] adverse witness under the original Rule 43-B?

Mr. Ruff: That is correct.

The Court: You may cross-examine upon any subject relative, because you are not limited by any direct examination.

Cross-Examination

By Mr. Ruff:

Q. Mr. Towle, after you left Chicago, or Salt Lake City, on the morning of August 10, did you then go to Chicago? A. No, sir.

Q. You went straight to New York?

A. No, sir.

Q. When did you arrive in New York City?

A. We arrived in New York City on the—three days elapsed. That would be the 12th.

Q. On the 12th?

A. The 12th of August.

Q. After you arrived in New York City, you

(Testimony of George J. Towle.)

wrote a letter to Mr. Clarence Betz, who was your accountant, did you not? A. Yes.

Q. And Mr. Betz was handling matters for you in your absence, was he not, with regard to this Norbest affair?

A. He was handling matters in regard to the bookkeeping, and regarding checks, receiving checks, and paying checks. [82] My secretary at the office took care of correspondence. The correspondence and general office.

Q. But, he was handling the financial end of the Norbest transaction?

A. Yes. Just a minute. With one exception. The checks that would come in would be deposited by my secretary.

Q. Yes, but he is the one who looked at them, verified them and checked the amount and that type of thing? A. Yes.

Q. Now, you wrote Clarence Betz on August 12 from New York City with regard to the meeting that you had had with Norbest and Adams, did you not? A. Yes; I did.

Q. I will hand you this letter and ask if that is the letter you wrote to Mr. Betz?

A. That is the one.

Mr. Ruff: I ask that this be introduced as next in order.

The Court: All right. Defendants' Exhibit A will be admitted.

* * *

Q. (By Mr. Ruff): In this letter you state:

(Testimony of George J. Towle.)

“Dear Clarence: Had a visit with Norbest, [83] Adams of Towle Food Products in Chicago on Monday”——

You say you weren't in Chicago? A. No.

Q. Is the letter in error in that respect, that it says you had the meeting in Chicago on Monday?

A. It is.

Q. What should “Chicago” be in this letter, “Salt Lake”? A. “Salt Lake.”

Q. You then go on to say:

“Tuesday Adams was to give Norbest a check for all our unpaid invoices to Norbest at \$1.05 per pound.”

That you knew because of the conversations you had in Salt Lake; is that correct? A. Yes.

Q. You go on to include your estimate of what you owe Norbest at 99 cents up to and including the invoice 1858, which he gave you, and 2862, which I do not believe you had received.

“Towle Food Products still owes for four invoices.

“I have boxed the enclosed, which Norbest is not billing them for, as we have paid them.”

Now, that portion of the letter relates to certain earlier invoices that you had sent to the Chicago group, does it not?

A. That is true. [84]

Q. And for which you had not been paid?

A. Yes.

Q. And which Norbest was not going to bill Chicago for? A. Yes.

(Testimony of George J. Towle.)

Q. Adams said he would include them in his check to Norbest? Is that what that check is, that \$50,000 check that Adams gave to Norbest in Salt Lake?

A. I don't know.

Q. You don't know what that had reference to?

A. No; I don't.

Q. Would reading the letter help you a bit?

A. No. I read it over before. I still can't—don't know what he is referring to, what check he was referring to.

Q. You then go on to say:

“Please check this when you get the receipt and statement from Norbest. If not paid, send them a statement.”

By saying “send them a statement,” you refer to Chicago, do you not?

A. Yes.

Q. Not Norbest. Then you go on to say: “T.F.P. Inc.”——

The Court: What is T.F.P. Inc.?

The Witness: That is Towle Food Products, Inc., Chicago.

Q. (By Mr. Ruff): That is Chicago? [85]

A. Yes.

Q. “T.F.P., Inc., have also agreed to be invoiced and pay for some 80,000 and pay up by August 20. We should receive our check from Norbest shortly after.

“Fred George will be in touch with you and can explain anything regarding our understanding. Had great trip”—et cetera.

Now, the understanding, the agreement that was

(Testimony of George J. Towle.)

arrived at when you were in Salt Lake was as it is expressed in this letter, is it not, that Chicago would be invoiced for the balance of this commodity, for these 80,000 pounds, and that they would then pay up on the invoices by August 20. Now, that is what the understanding and the agreement was in Salt Lake, was it not?

A. There is something inconsistent in that letter.

Q. Well, you wrote the letter.

A. I know. I know, but there is something inconsistent there, because——

Q. Now, before you start answering that, just answer my first question. This is the agreement that you arrived at in Salt Lake, was it not, that the Chicago people would be invoiced by Norbest and they would pay up the invoices?

A. My recollection, Mr. Ruff, is that at the time——

Q. You can answer that, Mr. Towle, yes or no, and then [86] explain your answer if you wish.

Mr. Ruff: I ask that the witness be instructed to do so, your Honor.

Mr. Hoppe: If you can't answer with a yes or no answer——

The Court: I was going to say, he may or may not be able to answer it yes or no. If he can't, he certainly can explain, but I want you to give as direct an answer as possible. Then, you can explain. Do you understand the question?

The Witness: Yes, but I think I have to—let me say it this way: I don't remember. I don't re-

(Testimony of George J. Towle.)

call that I was aware of an extension of time to the 20th of August. Now, as I say, that is something inconsistent with my memory. Now, how to account for it, I don't know. I say Chicago in there when I obviously meant Salt Lake.

Q. (By Mr. Ruff): You say you don't understand that because you don't recall that you were aware of an extension of time to August 20? On your direct testimony my recollection is that you stated that you had not communicated with anybody from Norbest after you left Salt Lake on August 10th?

A. To the best of my recollection I did not correspond with anybody from Norbest.

Q. Nor did you communicate with anybody from Chicago; is that correct? [87]

A. To the best of my knowledge. I can't say. That is what I believe is inconsistent in something there or something I said. Now, I can't explain it. Mr. Ruff.

Q. Well, you wouldn't have said it unless you had known it, would you?

A. No. Well, I don't know how I could, because I had left by the time Mr. Beyers and Mr. George and Mr. Adams wrote that letter, or whoever wrote the letter. I guess it was Mr. Beyers.

Q. You didn't create it out of whole cloth. did you, when you put it in this letter? It is not a fabrication?

A. I don't think so, but I can't account for it.

Q. Well, passing the matter of the extension of

(Testimony of George J. Towle.)

time, the fact of the matter is that the agreement and understanding that was arrived at in Salt Lake is that the Chicago people would be invoiced by Norbest and they would pay on the basis of these invoices?

A. Well, yes, but when you invoice, invoice and pay for by a date, I think that is significant of probably—aside from a C.O.D., a sight draft, a C.O.D.

Q. That is not my question. My question is that it was the understanding that the Chicago people would be invoiced; isn't that correct?

A. Yes.

Q. All right. That was the understanding, that they [88] would be invoiced.

Mr. Hoppe: You haven't read the whole sentence to the witness, counsel.

Mr. Ruff: I am not referring to the letter. I am asking the man about his understanding, which, I assume, on August the 12th, two days after the meeting, would be much better than his present recollection.

Q. You would agree to that, wouldn't you?

A. I would.

Q. And the understanding was that they would be invoiced.

Now, there was no agreement, was there, with regard to any sight draft billing?

A. No agreement between Norbest and myself?

Q. Correct.

(Testimony of George J. Towle.)

A. No. You are referring to a written agreement?

Q. A written or oral.

A. I can't answer that. I don't recall.

Q. You don't recall?

A. I don't recall there was anything oral, and I am—I know there is no written agreement. I am sure.

Q. In other words, there was no written agreement between yourself and Norbest with regard to the sight draft billing, that you are sure of?

A. Nothing written.

Q. All right. Now, with regard to the oral part of it, [89] you just don't know; is that your testimony?

A. Well, I don't recall.

Q. You don't recall whether there was or whether there wasn't?

A. No.

Q. You recall your deposition was taken on April 22nd, 1958, do you, Mr. Towle?

A. Yes.

Q. I will ask you to refer to the deposition. It is Page 47, Lines 13 through 19.

Starting right here, Line 13 down through Line 19, I will ask whether or not this question was asked and this answer given:

“Mr. Ruff: That is not my question of you, Mr. Towle. My question is that it is recited in your letter of August 12th to Mr. Betz the understanding was simply this, that charge would be invoiced and they would make payment for the billing of this material by August 20th, and that was the extent of the understanding. There was no agree-

(Testimony of George J. Towle.)

ment that there was going to be any sight draft billing? A. No agreement, no."

Now, that was your answer, wasn't it?

A. Yes.

Q. And that is your present testimony, isn't it, that [90] there was no agreement of any kind that there was going to be any sight draft billing, either oral or written?

A. Well, you asked me, I think, if there was anything—I explained that there was no agreement written. As to the oral, I said I don't recall.

Q. Now, I am asking whether you wish to change the testimony that you gave in your deposition? A. Well, I don't refer to any oral——

Q. I don't refer to anything. I simply say there was no agreement that there was going to be any sight draft billing, and your answer is:

"A. No agreement, no."

The Court: The question is: Do you want to change that, or is there an explanation for it?

The Witness: Well, I don't know how to answer it.

The Court: Let us parse it first. Do you want to change what you said? Is there anything to change as far as you know, any additions, alterations?

The Witness: I would say there was no written agreement. As to oral agreement, I can't answer.

Mr. Ruff: All right. You can't answer.

Q. When you returned from Europe and saw Mr. Beyers, and you did see Mr. Beyers on your return from Europe, did you not?

(Testimony of George J. Towle.)

A. Yes; I did. [91]

Q. That was in October, was it?

A. Yes; the latter part of October.

Q. Do you recall the date when you saw Mr. Beyers?

A. Approximately the 26th, or close to it.

Q. Where did you see Mr. Beyers?

A. In Salt Lake.

Q. And you made it your business to go see Mr. Beyers because of the fact that you understood that he had some difficulty in collecting the billing of this money, is that correct?

A. Well, two reasons. It was a normal stop between St. Paul and California. I stopped many times.

Q. You found out about the fact that this money hadn't been collected when you arrived in New York on October 22nd; is that correct?

A. Yes.

Q. You had some letter there waiting for you, is that it? A. Yes; that is true.

Q. When you saw Mr. Beyers in October in Salt Lake City, did you at that time say anything at all to him about the lack of sight draft billing, or about their being no sight draft billing, or about his having failed to bill sight draft or anything of that sort?

A. Well, this is going to sound rather strange, but I don't recall any conversation at all. I remember seeing Mr. [92] Beyers in his office. What we talked about, I haven't any idea.

(Testimony of George J. Towle.)

Q. I refer you to Page 80 of your deposition, at Lines 18 through 25, which represents questions being asked of you by your own counsel, Mr. Hoppe, and I also refer you at the same time to Page 81, Lines 21 through 25, and ask whether or not these questions were asked and these answers given:

“Mr. Hoppe: Now, you were asked whether you discussed the question when you saw Herb Beyers on your return from your trip to New York to Europe when you dropped in to see Mr. Herb Beyers. You were asked whether you discussed the question of the sight draft bill of lading matter with Herb at the time and you said that you didn’t recollect?

“A. I don’t recollect.

“Q. Do you recollect if Mr. Beyers discussed it with you?

“A. I don’t recollect any conversation about that at all.”

Page 81, Line 21, again by Mr. Hoppe:

“Q. Do you recall, try to think whether the sight draft bill of lading was discussed at all by anybody at that meeting on your return from your trip to Europe?

“A. I guess I have just strained my [93] memory a little bit too much.”

Do you recall those questions being asked and those answers given? A. Yes.

Q. Do you wish to change your testimony as represented at Line 25, Page 80, that you don’t recollect any conversation about that at all?

(Testimony of George J. Towle.)

A. I don't believe I quite understand, Mr. Ruff. What is it you want me to answer?

Q. Your testimony here on the stand has been that you don't have any recollection of any of the conversation with Mr. Beyers.

A. Well, isn't that what I say here?

Q. Not as I read it, Mr. Towle.

Mr. Hoppe: I read it that way here. I think it is perfectly consistent.

The Court: That is the point now. It seems to me you have made your point.

Mr. Ruff: I will pass, your Honor.

Q. Now, you also had a meeting with Mr. Hart in Chicago, did you not? In November of 19——

A. Yes.

Q. Of 1954? A. Yes; I did.

Q. And I assume that the purpose of that meeting was [94] to attempt to make collection of that amount of money that you claimed to be owing to you; is that correct? A. That is true.

Q. This amount of money that you claim to be owing to you represents simply the 10-cent profit that you expected to make on these turkey logs, doesn't it? A. Yes. [95-97]

* * *

Q. At the time of your conversation with Mr. Hart in Chicago, did you at all discuss with him the matter of sight draft bill of lading and the failure to sight draft or anything of that sort?

A. I don't recall that.

(Testimony of George J. Towle.)

Q. You don't recall whether you did or not, or you don't recall that you did, which?

A. Is there a difference?

Q. Yes, there is a difference.

The Court: You can have a failure to recollect something completely, or you can remember that that was not the case. That is the point.

The Witness: Well, my recollection is that I don't recall having discussed it.

Q. (By Mr. Ruff): All right. Now, as a matter of fact, is it not so that so far as the Norbest people are concerned and any liability on their part, this was purely an afterthought so far as you were concerned, was it not?

A. Which, Mr. Ruff?

Q. Any liability on the part of Norbest or responsibility on the part of Norbest. It was an afterthought after you found out that you couldn't get the money from Hart? [98]

A. I don't—I wouldn't say that it was an afterthought, no.

Q. You would not say that it is an afterthought?

A. No. I think it is perfectly logical that we attempt to get the money from Mr. Hart, first, because he is the one that bought the turkey logs.

Q. I refer you again to the deposition, Page 75, Line 26, through Page 76, Line 6.

A. Page 77?

Q. Page 75. A. 75.

Q. The last line, Line 26, and Page 76.

A. Through Line 8?

Q. Yes. In part.

(Testimony of George J. Towle.)

“Q. In other words, this matter of some responsibility on the part of Norbest was, so far as you were concerned, an afterthought after you found that you couldn’t get the money from Hart?

“A. You say me individually or my attorney?

“Q. You individually.

“A. (No response.)

“Q. You have the question?

“A. I answered, didn’t I?

“Q. No. [99] A. I said ‘Yes.’

“Q. I am sorry. I didn’t hear you.

“A. On the advice of attorney.”

Now, it is the fact that so far as you individually are concerned that the matter of any responsibility on the part of Norbest is an afterthought when you found you couldn’t get the money from Hart?

A. I am trying to justify the “afterthought” part of it.

The Court: Mr. Towle, you don’t have to get into a semantic argument on this thing.

The Witness: I am not trying to.

The Court: I think what you are attempting to do is to argue it with Mr. Ruff. I don’t mean you are being in any sense arbitrary or contumacious about the thing, but in essence, your answer is an argument by trying to explain or by trying to argue about the word “afterthought.” You are perfectly at liberty to say what you meant by the use of the word “afterthought,” in your deposition if that is what you want to do. Now, is that what you are trying to do?

(Testimony of George J. Towle.)

The Witness: I think it is perfectly logical that we attempt to collect money from——

The Court: That is just an argument.

The Witness: Yes. [100]

The Court: In other words, that is something your lawyer can argue just as well as you can from the witness stand unless this goes to your frame of mind. In other words, if this was the reason for your doing something or for not doing something, you are perfectly proper to say that is the reason you had in your mind, but for you to say here and now that is the justification for your procedure as of now, that is an argument.

The Witness: I see.

The Court: The argument will be made by your lawyer. You don't have to do it.

The Witness: Well, I turned this over to my lawyer, and he was the one that made these procedures, and when he thought of it or when he decided to attempt to make collection from Norbest Turkey Growers, I don't know that it was an afterthought as far as he was concerned, or whether he planned all this in the first place. I am not in a position to say what he thought. I followed his instructions.

The Court: When you used the word "afterthought" in the deposition, did you mean that it was another method of collecting the money, since you were unable to collect it from Hart, or unwilling to attempt to collect it from Hart?

The Witness: I don't think that the term "after-

(Testimony of George J. Towle.)

thought'' is necessarily—how will I say that? I don't know. I am mixed up. [101]

Mr. Hoppe: I think if the whole question is read to the witness—You see, Mr. Ruff only read part of the question to the witness. What he did, he stated it first one way, and then he stated it in other words. I would like to read the whole question instead of just part of it.

The Court: Mr. Ruff, will you do it then?

Mr. Ruff: Where do you want me to start?

Mr. Hoppe: Right where it says:

“Q. He states in his letter”——

Mr. Ruff: I will start wherever you wish. Page 75, Line 19:

“Q. He states in his letter”——

And I may add parenthetically to explain this, Mr. Hoppe, the letter we are referring to as the letter which Mr. Stewart, the attorney for Towle, wrote to Norbest on September 1st of 1955.

Mr. Hoppe: Right.

Mr. Ruff: (Reading):

“Q. He states in his letter: ‘As you know, for approximately the past year we have made concerted efforts on behalf of Towle and George to collect from Towle Food Products,’ and I direct you to the last page of the letter, Page 4, stating in part: ‘We again assure you that reluctantly and only as a last resort that we impose [102] responsibility on you.’

“Q. My question, in other words, is this matter of some responsibility on the part of Norbest was so far as you were concerned an afterthought after

(Testimony of George J. Towle.)

you found that you couldn't get the money from Hart?

"A. You say me individually or my attorney?

"Q. You individually.

"A. (No response.)

"Q. You have the question?

"A. I answered, didn't I?

"Q. No. A. I said 'Yes.'

"Q. I am sorry. I didn't hear you.

"A. On the advice of attorney."

A. Well, I think I answered by saying that I was governed by my attorney, who was Edgar Stewart.

Q. But so far as you individually are concerned, you stated in your deposition it was an after-thought?

A. I think when a client starts thinking with his attorney, he is going to get in trouble. [103]

* * *

Redirect Examination

By Mr. Hoppe:

Q. That did not include the \$2680.67 boxed that you discussed in your letter with Mr. Betz, did it?

A. Which check?

Q. Mr. Ruff asked you whether the amount that you were going to try to collect from Hart in Chicago represented the 10 cents, or the 19,000 some-odd dollars, and you said something to the effect of "Yes." Did you intend to include in your answer the thought that you had abandoned your claim for \$2680.67 for which there is no check? [104]

(Testimony of George J. Towle.)

A. Oh, no. That was beside the issue.

Mr. Hoppe: That is all.

Recross-Examination

By Mr. Ruff:

Q. That had nothing to do, Mr. Towle, with your situation with Norbest at all? A. No. No.

Q. That was simply between you and Chicago?

A. Yes.

Q. All right. [105]

* * *

JOHN HERBERT BEYERS, SR.

called as a witness by the defendants, being first duly sworn, thereupon testified as follows:

Direct Examination

By Mr. Ruff:

Q. You are general manager of the defendant, known as the Norbest Turkey Growers Association, Mr. Beyers? A. I am.

Q. You were so acting as general manager in the year 1954? A. Yes, sir.

Q. Directing your attention, Mr. Beyers, to the date of August 10, 1954, do you recall on that date a meeting was had between yourself, Mr. Angelo Adams, and Mr. Fred George? A. I do.

Q. Where was that meeting held?

A. In my office in Salt Lake City.

Q. Were there any other persons present?

A. Our office manager, Mr. Paul Heinberg, was there part of the time. [106]

(Testimony of John Herbert Beyers, Sr.)

Q. Would you state what took place at that meeting, what was said by the parties at the time of the meeting?

A. We spent considerable time, and in various types of discussions as I remember. Mr. Adams presented us with a check which brought their account almost current, and as I remember, one of the things they had outstanding was a truckload of logs that was being currently delivered. A sight draft was requested on those, and in view of the fact that they couldn't clear through the bank, we put them on C.O.D. Because of the way the trucks move on this firm, we requested C.O.D., and they proceeded to make collections. I spent some time, as I recollect, talking with Mr. Adams about the situation and the problems of moving this merchandise by truck. Also, we spent some time talking about the tonnage which was in the warehouses in a number of places, * * * [107]

* * *

Well, we discussed where this merchandise was and how and when it was to be transferred, and as I remember, we put it down in writing. And from there we spent a little time discussing a possibility of a new product, or the manufacture of a new product of which his organization had a contract with us for the coming season.

Q. At any time during these conversations, and, I assume Mr. George was present at all times, was he not?

A. As I remember, Mr. George was present with Mr. Adams at that meeting.

(Testimony of John Herbert Beyers, Sr.)

Q. At any time during these conversations, did you tell Mr. Adams or state to anyone that on future deliveries or transfers to Chicago there would be a sight draft bill of lading? A. No, sir.

Q. Was there any discussion of sight draft bill of lading with regard to this material that was to be transferred to the Chicago people?

A. Not to my knowledge.

Q. And, I believe as I recall Mr. George's testimony, he stated that Mr. Adams asked you to write him a letter; is that correct?

A. That's right. I dictated the letter while they were in the office. [108]

Q. You dictated the letter while they were in the office? By that, you mean Mr. George and Mr. Adams? A. That's correct.

Q. Did Mr. George at any time during this meeting make any mention or say anything with regard to the sight draft bill of lading on the material to be transferred to Chicago?

A. Not to my knowledge.

Q. I will hand you this letter which has been introduced in evidence as Plaintiff's Exhibit 13 and ask you if this is the letter which you dictated in the presence of Mr. Adams and Mr. George in your office on August 10?

A. Yes, sir. That is the letter.

The Court: What letter is that? What exhibit?
Mr. Ruff: 13, your Honor.

Q. And this letter states in part, if I may quote:
"This letter is per our understanding in relation

(Testimony of John Herbert Beyers, Sr.)

to the agreement made between our organization and the Turkey Log Corporation of Illinois on May 25, 1954, in which there was a companion agreement that 190,000 pounds of turkey log now in stock was to be taken over by July 31, which was to be paid for by Mr. George Towle.

“We are amending this agreement to read that approximately 88,000 pounds stored in the Pacific Coast will be relabeled and paid for by Towle Food Products Company by August 20, except tonnage in Los Angeles, to [109] be paid for by August 25.”

Is that correct? A. That's correct.

Q. Now, did you later have a visit from Mr. George Towle in Salt Lake City during the latter part of October? A. Yes, sir.

Q. Do you recall what the date of that meeting was, approximately?

A. As I remember, it was October 27.

Q. Were there any persons present except yourself and Mr. Towle? A. No, sir.

Q. Would you state what you discussed at this meeting?

A. Mr. Towle, as I remember, discussed the fact that the moneys had not been paid to him by the Chicago corporation. He spent a little time pondering as to how best to go about collecting, and in the conversation, I told him that we were manufacturing one load for the Chicago corporation of which they had a markup of 10 cents a pound, or about some \$3,000. I stated that was being manufactured for Armour and Company, and he asked

(Testimony of John Herbert Beyers, Sr.)

if he might take over these funds. I called our attorney, and he said that in view of the contract that we had with the Chicago corporation, that if they wanted to take over the funds, that they should attach them, that they should file a formal attachment on them. I so told Mr. Towle when he [110] was in the office, but I did say that I would not pay over these funds unless they demanded the payment of them, and when he——

Q. By “they” you mean the——

A. The Chicago corporation. And when they made the demand, I would have to pay them. As I remember, they made the demand on November 17th, and they had not filed the attachment.

The Court: Chicago made the demand about November 17? And Mr. Towle had not filed an attachment?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Ruff): This \$3,000 sum owed, this had to do with a contract that you had with the Chicago people?

A. That is correct. However, I was hopeful that they could collect on this.

Q. In other words, minimize their damages to that extent? A. That’s right.

Q. Was there anything said to you by Mr. Towle in that conversation with regard to your failure to bill by sight draft bill of lading to Chicago, or anything relating to sight draft bill of lading to Chicago?

(Testimony of John Herbert Beyers, Sr.)

A. Not to my knowledge at that meeting.

Q. When did you first become aware from any source that Mr. Towle or somebody on behalf of him was making a claim against you, or your company, I should say, with regard to some alleged liability on your part relating to this Chicago transaction? [111]

A. As I remember, it was about a year later; and I believed it was in September, 1955, the corporation received a letter from Mr. Stewart.

Q. And that is Mr. Towle's attorney at that time? A. Yes, sir.

Mr. Ruff: No further questions of the witness at this time.

Cross-Examination

By Mr. Hoppe:

Q. Mr. Beyers, with reference to the funds that you had which were owed to the Towle Food Products Company, this approximately \$3,000, how did that happen to come into your hands?

* * *

A. Oh, that was based on a new contract that was written up in May of—early in the year, and I made the sale to Armour with their permission.

Q. With whose permission?

A. With the Chicago organization's permission with the write-up of 10 cents a pound of which they were to be credited with after the product was delivered.

Q. Was that a carload of turkey logs?

(Testimony of John Herbert Beyers, Sr.)

A. Approximately, yes. sir. [112]

Q. What was the selling price per pound on those turkey logs?

A. I don't remember the price, sir. We could go back to the report except that there was the override on it.

Q. Was it in the neighborhood of a dollar a pound?

A. Well, I would think about that. The market varied depending upon circumstances.

Q. Now, on the day that you received the demand from Hart for this \$3,000, you had had a telephone conversation with an attorney representing Mr. Towle up there, a Mr. Wood R. Horseley?

A. I don't remember. Someone called me there. However, there was a close proximity. However, I had mailed the check out, and the check was in the mail prior to the time that we received a call from him.

Q. And you received the call from him on the same day; is that right?

A. It was the same day in the afternoon or a day later. Now, I'm not sure about that.

Q. Was the date November 17, 1954?

A. I don't remember the date, sir. I remember someone called me and I told him that the check had been mailed, was in the mail.

Q. How long did you have that check in your possession prior to November 17, 1954? [113]

A. Well, it was approximately three weeks.

Q. You had the check for three weeks?

(Testimony of John Herbert Beyers, Sr.)

A. Yes.

Q. How long did you have the money in your hands?

A. What do you mean, the money?

Q. The \$3,000.

A. I had it all the time.

Q. When did you get your money from Armour for the turkey logs?

A. I suppose—We probably got it 10 days after it was billed, something like that.

* * *

At this time the defense rests.

The Court: Any rebuttal testimony [114]

Mr. Hoppe: No rebuttal.

The Court: All right. Then the evidence is closed.

Mr. Hoppe: The plaintiff rests.

* * *

[Endorsed]: Filed December 15, 1958. [115]

PLAINTIFFS' EXHIBIT No. 1

General Partnership Agreement Towle-George Turkey Log Company

This Agreement executed this 1st day of June, 1953, by and between Fred George (Hereinafter referred to as "George"), of Berkeley, California, and George J. Towle (hereinafter referred to as "Towle"), of Walnut Creek, California,

Witnesseth:

Whereas, George is the inventor of a product known as "Turkey Log" and is the owner of a fifty per cent (50%) undivided interest in an Application for U. S. Letters Patent for Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 3, 1950, as Application Serial No. 136,544; and an Application for Food Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on April 7, 1951, as Application Serial No. 219,845; and an Application for Canned Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 5, 1953, as Application Serial No. 329,665; and

Whereas, George and the Norbest Turkey Growers Association (hereinafter referred to as "Norbest"), contemplate the creation of a joint licensing program to be administered under an agency agreement with Stephen S. Townsend (hereinafter referred to as "Townsend"), the particulars of which have been fully disclosed to Towle; and

Whereas, George and Towle desire to associate themselves as partners for the purpose of promoting for profit the manufacture, sale and distribution of Turkey Logs (either in their original or some other form) produced by Norbest-George licensees, under the trade name of "Towle's Pioneer Turkey Log" or "Towle's Frontier Turkey Log," or such other trade names as may be deemed appropriate,

and of promoting the distribution of the said product in standardized commercial packages for such producers or processors thereof as may desire to participate in the partnership merchandising program, and for such other purposes as may be reasonably related to the foregoing; and

Whereas, the parties desire to define the terms of their association and to commit their agreement and understanding to writing,

Now, Therefore, intending to be legally bound hereby, the parties hereto hereby agree to associate themselves as co-partners under the laws of the State of California under the following terms and conditions:

I.

Name and Place of Business

1. The name of the partnership shall be Towle-George Turkey Log Company or such other suitable partnership name or names as the partners may from time to time mutually agree upon.

2. The principal place of business of the partnership shall be at the office of George J. Towle at 2710 Mt. Diablo Boulevard, Walnut Creek, California, and at such other localities within or without the State of California as may be agreed upon by the partners.

II.

Purposes of the Business

1. The partnership shall engage in the business of soliciting licensees under the Norbest-George li-

censing program hereinbefore mentioned and any other producers of said Turkey Logs, for the purpose of selling to such licensees or other producers the services of the partnership in the marketing and merchandising of said Turkey Logs. In connection therewith, it is anticipated that the partnership will make available distribution facilities, and will provide standardized commercial packages and advertising and product promotional services for such turkey log processors who may desire to avail themselves of the partnership's merchandising program. A charge for said services provided by the partnership will be made to all processors participating in the said merchandising program.

III.

Capital Investment Accounts and Withdrawals

1. George and Towle will advance from time to time, the funds necessary to cover the current expenses of the partnership. The capital contributions of each partner shall consist of the funds so advanced by each partner. Each partner shall be entitled to reimbursement from the assets and net profits of the partnership for funds so advanced, and may withdraw the same at any time and from time to time, and no salaries or profits shall be paid or distributed until said advances have been repaid in full.

IV.

Profits and Losses

1. The net profits or net losses of the partner-

ship shall be distributable or chargeable, as the case may be, to each of the partners equally.

2. An individual income account shall be maintained for each partner. Profits and losses shall be credited or debited to the individual income accounts as soon as practicable after the close of each fiscal year, and may be withdrawn from time to time as the condition of the business warrants.

V.

Management; Salaries

1. Each of the partners shall have an equal voice in the management and conduct of the partnership business. In the event of conflict, however, it is understood and agreed that the decision of Towle on merchandising and distribution questions shall prevail and the decision of George on processing and production questions shall prevail. Each partner shall devote his full time and attention to the partnership business, it being understood, however, that time devoted to the Norbest-George licensing program shall, for the purposes of this agreement, be deemed time devoted to partnership business, and provided further, that the parties recognize that Towle is engaged in other business through the Towle Manufacturing Corporation and may devote such of his time to the same as shall not interfere with his obligations and responsibilities hereunder. Each partner shall receive such salary as shall from time to time be agreed upon, but during such time as both partners shall have equal liabil-

ity for obligations of the partnership the payment of salaries shall be an obligation of the partnership only to the extent that there are partnership earnings and assets available therefor and shall not be an obligation of the partners individually. Salaries shall be treated as expenses of the partnership in determining net profits or net losses. If at any time and for any reason (including the death, retirement, insanity or disability of any partners), the partners shall devote substantially disproportionate amounts of their time to the partnership business, the partners shall be compensated by adequate salaries in proportion to the time devoted by each to the business of the partnership, and such salaries shall be treated as partnership expenses.

VI.

Dissolution

By the provisions of this paragraph the parties intend to establish their respective rights and duties and the rights and duties of their respective successors, in the event of the dissolution of this partnership by the mutual agreement of the partners, by the withdrawal of one of the partners, or by the death or incompetency of one of the partners.

For the purpose of dissolution resulting from the withdrawal of one of the partners, the value of the partnership shall be the net worth of the partnership at the close of the calendar month next preceding the month in which notice of desire to withdraw is given (as hereinafter set forth), plus an

amount equal to five times the average annual net profits of the partnership during the five-year period preceding the close of said preceding calendar month, or during such shorter period as the partnership may have been in existence. In the computation of net worth, no value shall be attributed to good will, going concern values, or similar intangibles.

For purposes of computing such net profits, and irrespective of salaries actually paid to the partners, the net profits earned during such period as disclosed by the books of the partnership, shall be adjusted so as to include as an expense deductible therefrom reasonable compensation to the partners for their services to the partnership during the computation period. In this connection, it is agreed that reasonable compensation for the services of each of the partners shall be assumed to be the sum of \$1,000 per month, or 50% of the net profits of the partnership computed without regard to partner's compensation, whichever is lower.

1. Dissolution by mutual agreement. In the event the partners mutually agree to dissolve the partnership, neither of the partners shall have either rights or duties paramount to the other and each of the partners, forthwith upon their agreement to dissolve, shall proceed diligently to effect the complete liquidation and the winding up of the partnership business and affairs. Subsequent to the agreement of dissolution the partnership shall accept no new or additional business, and with

the greatest dispatch the obligations of the partnership shall be paid and the remaining assets shall be divided in cash or in kind equally between the partners. For the purpose of these computations all moneys in the income and capital accounts of the partners and all amounts due to the partners for earned or unpaid salaries shall be considered obligations of the partnership and shall be paid to the partners respectively entitled thereto.

2. Dissolution by withdrawal. Dissolution by withdrawal shall not be deemed to include the retirement of a partner without intent thereby to cease to be a partner, but, to the contrary, shall be deemed to include only a withdrawal with intent to cease to be a partner.

In the event either partner for any reason desires to withdraw from the partnership, he shall evidence his desire so to withdraw by giving to the other partner a notice in writing to that effect.

The partnership shall not be dissolved immediately upon the giving of such notice, but shall continue (unless the partners mutually agree otherwise) for a period of sixty (60) days after the date upon which said notice is given.

Subsequent to the giving of such notice, if the partners mutually agree during said sixty- (60) day period that the partnership should be dissolved in accordance with the provisions of subparagraph 1 hereof, the partnership forthwith, upon such mutual agreement, shall become and be dissolved

and thereupon shall be liquidated and wound up in accordance with said subparagraph 1.

In the absence of such mutual agreement, then during the first thirty (30) days of said sixty- (60) day period the partner receiving said notice shall have the option to buy the interest of the partner giving said notice for one-half of the value of the business established as hereinabove set forth, with such option to be exercised by giving to the other partner a notice in writing to that effect.

In the event such option is not so exercised, then the partner who previously gave notice of his desire to withdraw, as hereinabove set forth, shall have an identical option, during the remaining thirty (30) days of said sixty- (60) day period, to buy the interest of the other partner for one-half of said value of the partnership and such option shall be similarly exercised, to wit: by a notice in writing to the other partner.

In the event either of the last-mentioned options is exercised, then the partner exercising the same (who will be denominated the purchasing partner) shall become and be the sole owner of the partnership business and assets, subject, however, to his performance of the following acts:

(a) Upon the expiration of said sixty- (60) day period the purchasing partner shall pay to the withdrawing partner not less than twenty-five per cent (25%) of the purchase price.

(b) Likewise upon the expiration of said sixty-

(60) day period, the purchasing partner shall make and deliver to the withdrawing partner his note in the principal amount of the balance of the purchase price, payable in monthly installments of not less than five per cent (5%) of such balance. Such installment payments shall commence on the first day of the calendar month next succeeding the calendar month in which said sixty- (60) day period expires, and unpaid principal of said note shall bear interest at the rate of five per cent (5%) per annum. All payments made upon said note shall be applied first, to interest accrued and second, to unpaid principal, and said note shall provide that in the event legal action be instituted to collect the same the maker thereof shall pay to the holder such reasonable attorney's fees as may be fixed by the Court in which said action is instituted.

Upon dissolution of the partnership under this subparagraph 2, it is understood and agreed that the withdrawing partner shall not, without the consent in writing of the purchasing partner, for a period of five years thereafter engage in the business of the partnership in merchandising turkey logs under partnership trade names or through former partnership distributors, alone or in conjunction with any other person, partner or corporation. A violation of this covenant shall be deemed an act of unfair competition on the part of the withdrawing partner so attempting to utilize the assets or good will of the partnership business in conjunction with any other person after the dissolution of the partnership. The partners, each for himself, hereby

acknowledge that the purchasing partner would be irreparably damaged by such conduct and agree that the provisions of this covenant shall be enforceable by a decree of specific performance or injunctive relief restraining the breach of the provisions hereof.

Nothing herein contained, however, shall limit the right of the withdrawing partner after dissolution of the partnership to engage in the business of processing turkey logs, alone or in conjunction with others, and marketing the same for his or their own accounts so long as partnership trade names, merchandising or distribution facilities are not employed in conjunction therewith.

3. Dissolution by death or incompetency. In the event of the death or judicially declared incompetency of either of the partners, the surviving or competent partner (hereinafter referred to as surviving partner) forthwith shall become and be the sole owner of all business and assets of the partnership, whether tangible or intangible, subject, however, to all partnership liabilities, and subject also to his performance of the following acts:

(a) He shall pay to the proper representatives or successors of the deceased or incompetent partner all sums due from the partnership to the deceased or incompetent partner at the date of the death or declaration of incompetency on account of loans, advances, accrued salary, or undistributed profits. The payment of said items in the aggregate shall be made as follows:

An initial payment of not less than twenty-five per cent thereof on or before the first day of the third calendar month following the calendar month in which occurs the death or judicial declaration of incompetency, provided, however, that such initial payment shall not be due or payable until such time as the person or persons receiving the same have legally established their right to such receipt.

The balance shall be paid in monthly installments of not less than ten per cent of such balance, commencing on the first day of the calendar month next succeeding the month in which the initial payment above referred to becomes due and payable. Said balance shall be evidenced by a promissory note made and delivered by the surviving partner, providing for the payment of interest on unpaid principal of said note at the rate of five per cent per annum. All payments made upon said note shall be applied first to interest accrued, and second to unpaid principal, and said note shall provide that in the event legal action be instituted to collect the same, the maker thereof shall pay to the holder such reasonable attorney's fees as may be fixed by the Court in which such action is instituted.

(b) During an initial period of five years following such death or judicial declaration of incompetency, the surviving partner shall pay to the legally qualified representatives or successors of the deceased or incompetent partner a sum equal to fifty per cent of the net profits earned in the business during such period. The surviving partner

shall account for and pay such profits periodically, but at least as often as annually, and for the purpose of computing, accounting for and paying such profits, losses incurred during any part of said five-year period shall be carried forward, and profits for subsequent portions of said period shall be adjusted to reflect and take into account such losses, to the end and with the result that in the computation and payment of the aggregate sums payable under this subparagraph (b), there will be considered in the aggregate any losses sustained by the business during the entire period.

In recognition of the fact that the services of the deceased or incompetent partner would have been of value to the business, and, after the surviving partner becomes sole owner of the business, will have to be replaced at the expense of the business or performed by the surviving partner, it is agreed that during any period in which the surviving partner is required to make payments to the representatives or successors of the deceased or incompetent partner (including periods hereinafter referred to), the surviving partner may include as an expense of the business in computing the net profits thereof, a sum of \$1,000.00 per month as a salary to himself, and a further sum of \$1,000.00 per month (whether actually expended or not), as payment (either to the surviving partner or others) for services to the business which would have been rendered by the deceased or incompetent partner had he continued actively to participate in the partnership business.

(c) For a further period of five years following the expiration of the initial five-year period hereinabove referred to, the surviving partner shall continue to make payments equal to a share of the net profits of the partnership business to the persons entitled to and upon terms and conditions governing such payments for the initial five-year period, except that during said further five-year period such payments shall equal twenty-five per cent of the net profits of the business instead of the fifty per cent of such profits which are payable during said initial five-year period.

Upon the expiration of said further five-year period, the surviving partner shall have no further obligation of any kind to the deceased or incompetent partner or to the representatives or successors of the deceased or incompetent partner.

4. Indemnity. In the event of the dissolution of the partnership for any of the reasons hereinabove set forth, the surviving, remaining or competent partner shall assume and pay all obligations of the partnership, whether incurred prior or subsequent to the date of the death or withdrawal of the deceased or withdrawing partner, or the date of the declaration of the incompetency of the incompetent partner, and shall save harmless the deceased or withdrawing or incompetent partner, his heirs, administrators, successors and assigns from any and all claims or demands which may be asserted against them or any of them on account of the

partnership status of said deceased or withdrawing or incompetent partner.

VII.

Partners' Powers and Limitations

1. Notwithstanding any provision of paragraph V of this agreement, no partner may without the consent of the other partner:

(a) Incur any item of expense in the conduct of the partnership business in excess of \$500.00 except with the joint approval of both partners.

(b) Assign, transfer, pledge, compromise or release any of the claims of or debts due the partnership except upon payment in full or arbitrate or consent to the arbitration of any of the disputes or controversies of the partnership.

(c) Make, execute or deliver on behalf of the partnership any assignment for the benefit of creditors or any bond, confession of judgment, chattel mortgage, deed, guarantee, indemnity bond, surety bond, or contract to sell or contract of sale of all or substantially all of the property of the partnership.

(d) Lease or mortgage or convey any partnership real estate or any interest therein or enter into any contract for any such purpose.

(e) Pledge or hypothecate or in any manner transfer his interest in the partnership, except as specifically provided herein.

(f) Become a surety, guarantor, or accommodation party to any obligation.

VIII.

Miscellaneous

1. The partnership shall maintain in the partnership name a bank account or bank accounts in such bank or banks as may be agreed upon by the partners. All funds of the partnership shall be deposited in such account or accounts.

2. All notices provided for under this agreement shall be in writing and shall be sufficient if sent by registered mail to the last known address of the party to whom such notice is to be given.

3. The parties hereto covenant and agree that they will execute any further instruments and that they will perform any acts which are or may become necessary to effectuate and to carry on the partnership created by this agreement.

4. Financial records of all matters pertaining to the partnership shall be maintained fully and accurately, in accordance with good accounting practices, and at all times properly posted, and said records shall be kept available at all reasonable times for inspection by the partners.

5. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors, personal representatives and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

/s/ FRED GEORGE.

/s/ GEORGE J. TOWLE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 2

Assignment of Interest in Royalties

This Agreement, made and entered into this 1st day of June, 1953, by and between Fred George (hereinafter referred to as "George"), of Berkeley, California, and George J. Towle (hereinafter referred to as "Towle"), of Walnut Creek, California,

Witnesseth:

Whereas, George and the Norbest Turkey Growers Association (hereinafter called "Norbest"), are each owners of a fifty per cent (50%) undivided interest in certain pending Applications for U. S. Letters Patent for Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 3, 1950, as Application Serial No. 136,544; and an Application for Food Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on April 7, 1951, as Application Serial No. 219,845; and an Application for Canned Turkey Product and Method of Preparing the Same, filed by George

in the U. S. Patent Office on January 5, 1953, as Application Serial No. 329,665; and

Whereas, George desires to assign to Towle a twenty per cent (20%) interest in the gross royalties received by him pursuant to the aforesaid patents, and

Whereas, George has fully disclosed to Towle pending negotiations with Norbest relating to a joint licensing program (hereinafter referred to as the "Norbest-George Licensing Program"),

Now, Therefore, in consideration of the payment by Towle of Five Thousand Dollars (\$5,000.00) to George, in cash, receipt of which is hereby acknowledged by George, George does hereby agree to pay to Towle twenty per cent (20%) of the gross royalties hereafter received by him or for his account, from or on account of any of the aforesaid patents. Gross royalties as used herein shall be determined before deduction of expenses of administration of the proposed Norbest-George Licensing Program or of the expenses of administration of any other patent licensing program to which George may hereafter become a party.

1. It is agreed that Towle shall share the expenses (not reimbursed by others) of solicitation by George of prospective licensees for the aforesaid patents to the extent of twenty per cent (20%) of the amount thereof, reimbursing George therefor upon satisfactory evidence of such expenses, and it is further agreed that George shall incur no expense on account of the foregoing in excess of the

gross royalties payable by George to Towle pursuant to the provisions of said original agreement, George does hereby agree to pay to Towle twenty per cent (20%) of the gross royalties hereafter received by him or for his account from or on account of any of the patents referred to in said original agreement. "Gross royalties" as used herein shall be determined in the same manner as the same are determined under said original agreement.

2. As consideration therefor, Towle shall pay to George the sum of five thousand dollars (\$5,000) cash and George hereby acknowledges receipt of such sum.

3. The participation of Towle in certain expenses referred to in paragraph numbered 1 of said original agreement is hereby increased to forty per cent (40%)

4. George agrees that he will diligently and promptly do any and all acts necessary or proper to cause payment of royalties to be made by every licensee under the licensing program referred to in said original agreement, whether any such licensee be producing for Governmental or civilian consumption or use. Any expense relating to the foregoing shall be deemed an expense of administration of a patent licensing program as referred to in the provision of said original agreement immediately preceding paragraph numbered 1 thereof. This is not to be deemed a guarantee by George of the collectibility of any royalty payment.

5. Except as modified or supplemented hereby, said original agreement shall continue in full force and effect.

Dated: December 31, 1953.

/s/ FRED GEORGE.

/s/ GEORGE J. TOWLE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 4

[Plaintiffs' Exhibit No. 4 is identical to Exhibit A attached to the Complaint and is set out in full at pages 14 to 16 of this printed record.]

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 5

Sales Agreement

This Agreement executed between Norbest Turkey Growers Association of Salt Lake City, Utah, hereinafter referred to as "Seller," and the Turkey Log Corporation of Illinois, of 179 North Michigan Avenue, Chicago, Illinois, hereinafter referred to as "Buyer";

In consideration of the agreements herein contained, the parties mutually covenant as follows:

1. Seller hereby agrees to sell to Buyer and Buyer to purchaser all Turkey Logs manufactured

for civilian use by Seller during the period of time from September 1, 1954, to February 1, 1955.

2. Seller agrees not to license or offer to license any persons, firms or corporations who have not already received such offers and who have not been accepted within one week from date hereof by Stephen S. Townsend, of San Francisco, California, Patent Attorney for Norbest. This restriction shall terminate January 1, 1956. Provided, however, that Seller may license such other and additional persons, firms or corporations as it may see fit for the manufacture of Turkey Logs for military consumption.

3. Buyer agrees to purchase 410,000 pounds of Turkey Logs during the period from September 1, 1954, to February 1, 1955, at the rate of not less than 100,000 pounds per month consecutively during such season.

4. Buyer agrees to pay to Seller at Salt Lake City, Utah for said Turkey Logs a sum equal to two and one-half times the live weight per pound paid for the turkeys used in said manufacture of Turkey Logs, plus 25c per pound for manufacturing. Shipment shall be made by Seller to Buyer in carload or truck load quantities. F.O.B. Seller's plant at Rio Linda, California. Payment shall be made by Buyer at date of warehousing or shipment upon the weights as shown by the invoice or sight draft with Bill of Lading attached.

5. In the event Buyer defaults in ordering or paying for the Turkey Logs as prescribed above,

Seller is given the option to either terminate this contract and its obligations hereunder or to resort to such other remedies as may be available.

6. Also, in the event of default in the performance of that certain contract executed between Seller and George Towle or Walnut Creek, California, this date, Seller shall likewise have the same option of termination.

7. [Paragraph 7 is cancelled.]

8. It is understood that Buyer's rights of sale and distribution of Turkey Logs shall be limited to the Continental United States and that this agreement must be accepted and approved by the co-owners of the patent rights relating to said Turkey Logs, to wit, Seller and Mr. Fred George. It is the agreement of the parties that Seller reserves the right to manufacture or license for manufacturing the said Turkey Logs for consumption by the military forces or for foreign consumption.

9. In the event of default of performance by either party, the defaulting party agrees to pay all costs of enforcement, including reasonable attorney's fees.

Dated, this 25th day of May, A.D. 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,
Seller,

By /s/ J. R. GARRETT,
Asst. Manager.

/s/ PAUL F. LINDBERG,
Witness.

[Seal] TURKEY LOG CORPORATION
OF ILLINOIS,
Buyer,

By /s/ ROBERT L. GEORGE,
Secretary,

/s/ ANGELO ADAMS,
President,

/s/ L. EDWARD HART, JR.

/s/ G. J. TOWLE,
Witness.

Approval: .

The undersigned patent owners hereby approve
and ratify the within Agreement.

Dated, this 25th day of May, 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,

By /s/ J. R. GARRETT,
Asst. Mgr.,

/s/ FRED GEORGE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 6

[Plaintiff's Exhibit No. 6 is identical to Exhibit B attached to the Complaint and is set out in full at pages 16 to 22 of this printed record.]

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 7

Agreement

Fred George and George J. Towle, co-partners doing business under the name and style "Towle Food Products Co." hereinafter called the partnership, and Turkey Log Corporation of Illinois, hereinafter called the corporation, agree:

That, Whereas, of even date herewith the parties hereto have entered into an agreement relating principally to the purchase and sale of "turkey logs" and the payment by the corporation to George J. Towle of certain royalties, and

Whereas, under the provisions of said agreement, it is required that in the event the corporation transfers its business or said agreement, then the corporation will require such transferee to agree in writing to continue to make to said George J. Towle all royalty payments referred to in said agreement.

Now, Therefore, in consideration of the execution of said agreement and in supplementation and modification thereof, it is agreed that in the event the corporation desires to transfer said agreement, or the business of the corporation relating to said

royalty payments, and in the event the proposed transferee is unwilling to agree to continue to make said royalty payments to said George J. Towle as provided in said agreement, then said George J. Towle will waive the above-mentioned provisions of said agreement requiring the transferee to agree in writing to continue to make such royalty payments; provided, however, that in consideration of such waiver the corporation shall pay to George J. Towle forthwith upon such transfer a sum equal to ten per cent (10%) of the total considerations paid to the corporation for such transfer, less any brokerage fees and necessary expenses in connection with such sale.

Dated: June 10th, 1954.

TOWLE FOOD PRODUCTS,
INC.,

An Ill. Corporation,
Successor to

[Seal]

TURKEY LOG CORPORATION
OF ILLINOIS,

By /s/ L. EDWARD HART, JR.,
Its President, and

/s/ LYDIA C. NIEMUTH,
Its Secretary.

/s/ GEORGE J. TOWLE,

/s/ FRED GEORGE,
D.B.A. Towle Food
Products Co.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 8

July 22, 1954.

Norbest Turkey Growers Assn.,
Salt Lake City, Utah.

Att: Mr. Herbert Byers.

Dear Herb:

It is my understanding that on Saturday, July 10th, Ray Garrett and Ed Hart had a telephone conversation at which time your office agreed to some changes to paragraph 4 of sales agreement between Norbest Turkey Growers Association and George Towle. It is my understanding that the purchase of the 190,000 pounds of turkey logs involved in this agreement is to be extended from August 1st to some later date.

So that I may fully understand what changes have been made will you be kind enough to write me a letter outlining the terms of the purchase of turkey logs by the Towle Food Products, Inc. of Chicago.

Mrs. Towle and I are planning on leaving for Europe the first part of August by which time I had hoped that the agreement between your company and the Towle Food Products, Inc. of Chicago, and myself would have been completed. In as much as I will not be here at the termination of the contract it would help considerably if you would allow me to have the Towle Food Products Inc. of Chi-

cago, pay you direct rather than their paying me and me paying you. To simplify this, it would probably be easier if you were to invoice the Towle Food Products of Chicago, direct on the basis of \$1.05 a pound, F.O.B. Chicago, and crediting my account on the basis of \$.99 per pound with the \$.95 per pound retroactive figure to be credited at the proper time. You, in turn, could pay this office, Towle Manufacturing Co. of Walnut Creek, whatever credits accumulate where they will be deposited in my bank.

We will not be returning from Europe until the middle of October and I would like to have some satisfactory means of payment between our companies which I am sure you will be agreeable to.

Will appreciate your immediate consideration of this suggestion so that I can make my necessary plans.

Yours very truly,

TOWLE MANUFACTURING
CO.,

G. J. TOWLE.

GJT:egc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 9

[Letterhead]

Norbest Turkey Growers Association
P. O. Box 1529 - Salt Lake City 11, Utah

July 30, 1954.

Mr. George Towle,
Towle Manufacturing Company, Inc.,
2710 Mt. Diablo Blvd.,
Walnut Creek, California.

Dear Mr. Towle:

In reference to your letter of July 22nd in which you ask me about the telephone conversation that Mr. Garrett and Mr. Hart had, I talked with Mr. Garrett about this, and it was our understanding that 100,000# of turkey log would be taken and paid for by July 31st. We are very anxious to get this all cleaned up, and while 190,000# should be cleaned up and paid for by the end of this month, I am willing to extend the date to August 10th for the billing to be completed.

We observe your request to bill at \$1.18 for less than carload and at \$1.15 for carloads. We will be glad to follow your instructions, and at such time as a credit accrues to you, we will forward the money to your organization at Walnut Creek, California.

I appreciate your calling me today, and I hope that the money on the turkeys now billed will be in

to us early next month. I would suggest that if the turkey logs are not all billed by the tenth, that they be transferred over and we will bill them to you.

In reference to new production, young toms will soon be available and we will no doubt be working on that as soon as the 190,000# is exhausted. Also, there is a possibility we might have a small amount of tonnage left over in Los Angeles which we will be happy to bill to you in the event it is wanted. Kindly advise me your request in billing the new production which we may start on before you return from Europe. I'll be happy to hear from you further next week.

Yours very truly,

/s/ HERBERT BEYERS,

General Manager, Norbest

Turkey Growers Association.

HB:AW

CC: Mr. M. H. Simonson,
3132 - 17th St.,
Sacramento, Calif.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 10

August 3, 1954.

L. E. Hart,
Montgomery, Hart, Pritchard & Herriott,
120 S. La Salle St.,
Chicago, Ill.

Dear Ed:

I have just received a letter from Herb Beyers, a copy of which I am having made and enclosing with this letter.

There is one particular point I would like to call to your attention and that is paragraph three. You will note that Norbest are going to bill me on the 10th of August for all the Turkey Logs that have not been withdrawn. I know that you fully appreciate the position this puts me in so hope that you will be able to take care of this inventory because, as I have explained to you over the phone, I am simply not in a position to pay for this kind of merchandise without going through a lot of red tape. This would seem rather unnecessary at this late date so hope that you will be prepared to take care of my invoices.

My wife and I are leaving here on the 9th of August, flying to New York where we will leave on the 15th for Europe. We expect to be gone a couple of months or more so I have asked Norbest to bill you direct for me. Payment should be made to Norbest and they will credit my account accordingly. Also, Ed, any checks you send after receipt

of this letter should be made payable to Norbest Turkey Growers Association to credit Towle Mfg. Co.

I spoke to Ange on the phone last Friday and he mentioned the possibility of a conference with Norbest in Salt Lake. If you feel that this is necessary, and if it could be arranged to be there on Monday, August 9th, I could meet you there in the afternoon. We plan on leaving here around late forenoon and staying in Salt Lake that night anyway. So it would be desirable from my standpoint to sit in on any meeting you may have with Norbest relative to the present contract. Please advise me at once so that I will know whether or not anyone will be in Salt Lake on the 9th.

I have also asked Herb to make shipments on the basis on \$1.18 and \$1.15 for L.C.L. and full car shipments. If there are to be any changes in these prices please notify him.

I am advising Norbest that starting with new production you are to be billed direct and that the Towle Mfg. Co. is out of the picture in that respect.

I hope that you will do what is necessary to comply with the understanding with my letter from Herb. I think you can realize that I am in somewhat of an embarrassing position by not having to lived up to the terms on my contract with Norbest regarding payment of their invoices to me. In view of the extension of time it will be even

more embarrassing in the understanding between you and Ray Garrett as far as payment of these invoices is concerned. I would suggest that, if there is any possibility that you will not be able to pick up the invoices for the balance of the Turkey Logs, that you notify Norbest so that they would be in a position to dispose of any surplus inventory that you do not feel that you can sell, or that you would be willing to pay for.

I would like to have had all this cleared up before I leave on this trip but inasmuch as this seems to be impossible at this time, I hope that I can leave without having to be concerned over payment to Norbest.

We will be returning some time after the middle of October when, if we have time, I would like to stop in Chicago on the way to St. Paul where we intend to stop for a few days, and possibly have a visit with you.

With best regards,

TOWLE MANUFACTURING
CO.,

G. J. TOWLE.

GJT:egc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 11

August 3, 1954.

Mr. Herbert Beyers,
Norbest Turkey Growers Association,
Salt Lake City 11, Utah.

Dear Mr. Beyers:

I wish to acknowledge receipt of your letter of July 30th.

I have just written Mr. Hart sending him a copy of your recent letter so that he will be fully appraised of the facts contained therein.

I also notified Mr. Hart that the invoicing would come from your office on the basis of \$1.05 a pound with payment to be made to Norbest Turkey Growers Association crediting the Towle Manufacturing Co.

I also suggested that in the outside possibility that he would not be in a position to pick up the balance of the Turkey Log inventory to advise you accordingly so that you could dispose of them prior to the new production. I don't think there is a possibility of this occurring but mentioned it to him in case they have had a change of plans since our conversation with Mr. Garrett.

Upon the completion of their disposing of the present inventory of 190,000 pounds and beginning with new production, please be advised that this latter business is between Norbest Turkey Growers Association and the Towle Food Products, Inc.,

and that the Towle Manufacturing Co. has no part in this arrangement. You will bill them direct and look to them for payment. I would suggest, however, that you do not go into any new production for them until they have fulfilled the terms of their contract with me, which was to dispose, or, in any event, to pay for the 190,000 pounds of logs that are now in existence. This, however, is up to you but might, and probably will have the desired effect in getting them to make full payment of the monies they now owe. A letter to Mr. Hart prior to your contemplated new production might be in order and do us both some good.

They intimated over the phone last Friday that a conference in Salt Lake might be desirable in the near future. I explained to Hart that I was leaving here on the 9th and could, if necessary, stop in Salt Lake for a meeting if he felt that a meeting was necessary. If I hear from him prior to our leaving I will advise you accordingly.

I have also advised Hart that from now on he will be billed direct by Norbest and not from this office.

I am sorry that I have to seem to be running off in the middle of business but I had fully expected that these negotiations would be completed by this time. Our plans have gone too far, the ticket purchases, reservation, etc., to change them now and hope that the burden that I have put on you people relative to invoicing and collecting will not be too

It appears we extended the time until August 10th for the billing to be complete and I am hopeful it can be worked out on this basis. In the event that we are unable to get the 190,000 pounds of logs billed and paid for within the allotted time, we see no alternative for us but to request the cancellation of the agreement which we made and which you are a party to.

We are very appreciative of the opportunity to clean up this lot but it must be delivered and paid for as previously stated as we wish to clean up the present inventory. I will look forward to seeing Mr. Adams in the hopes that everything can be cleared up satisfactorily.

Wishing you a good trip to Europe.

Sincerely yours,

/s/ HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 13

[Letterhead]

Norbest Turkey Growers Association
Salt Lake City 11, Utah
P.O. Box 1529

August 10, 1954.

Mr. A. Adams, Vice President,
Towle's Food Products Co.,
540 Lakeshore Drive,
Chicago, Illinois.

Dear Mr. Adams:

I am writing you this letter as per our understanding in relation to agreement made between our organization and the Turkey Log Corporation of Illinois on May 25th, 1954, in which there was a companion agreement that 190,000 pounds of Turkey Log now in stock was to be taken over by July 31, 1954, which was to be paid for by Mr. George Towle.

We are amending this agreement to read that approximately 88,000 pounds stored on the Pacific Coast will be relabeled and paid for by Towle Foods Products Company by August 20th, except tonnage in Los Angeles, to be paid for by August 25th.

It is also agreed that the signature of the Turkey Log Corporation becomes binding to the Towle Food Products Company in connection with agreement made with that firm whereby they agreed to

purchase 410,000 pounds of Turkey Log from September 1st, 1954, to February 1st, 1955, at the rate of not less than 100,000 pounds per month, at the formula developed at that time.

It is also understood that during the 1955 season that Norbest Turkey Growers' Association will agree to furnish approximately one million pounds of Turkey Log for the second season, this to be agreed upon by both parties by June 1st, 1955. This represents the understanding of Mr. Adams and the writer as of this date.

Yours very truly,

/s/ H. B.,

HERBERT BEYERS.

General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 14

August 11, 1954.

Mr. Fred George,
Rt. 1, Box 902,
Danville, California.

Dear Fred:

I appreciated the opportunity of visiting with you on the turkey log operation and your inquiry

about our relationship with Towle Manufacturing Company at Walnut Creek, California.

I wish to state that as soon as the turkey logs are all sold and paid for, which we hope to have completed prior to August 31st, our organization will remit to the Towle Manufacturing Company the amounts due them, which we are collecting here.

I am hopeful these funds will be in so we can close our records here prior to September 1st.

Yours very truly,

HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 15

September 28, 1954.

Mr. Clarence E. Betz,
Towle Manufacturing Co., Inc.,
2710 Mt. Diablo Blvd.,
Walnut Creek, California.

Dear Mr. Betz:

I am enclosing a copy of our accounting on turkey log and I wish to report that Mr. Simonson

and I had extended meetings with Mr. Hart of the Towle Food Products in Chicago.

Mr. Hart was fully informed of the proposition of our allowing a price of 95c to Towle Manufacturing Company and since he stated there was legal problems involved between Towle Food Products and Towle Manufacturing Company, he refused to pay anything but the net amount due, which we accepted on the account.

While we were acting as Agents for you, it is my own opinion that the officers of these two corporations should get together and settle these differences, as I personally believe there will be little or no opportunity for us to collect this for you.

Yours very truly,

HERBERT BEYERS,
General Manager, Norbest
Turkey Growers' Assn.

HB:jf

cc/Fred George.

cc/M. H. Simonson.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 16

NORBEST TURKEY GROWERS' ASSOCIATION

Payments made by Towle Food Products Co. on Towle Mfg.
Co. Account

Date

7-26 Collections as follows:

On our invoice T-813 of 7-14-53	
J. Dennis Freeman & Son	
Bloomfield, Indiana	
300 Ctn. Tur-King 10,616—10	
at \$1.15	\$12,209.12
Universal Distributing Co.	
St. Louis Mo. 300 Ctn. Tur-	
King 10,493—7 at \$1.15	12,067.45
K & B Packing Co.	
Denver, Colo. 250 Ctn. Tur-King	
8,945—12 at \$1.15	10,287.61
Total	<hr/> \$34,564.18

8-16 Collection as follows on our invoice T-855 of 8-5-54:

Delivered to Kansas Cold Storage	
Co., Wichita, Kans.	
200 Ctns. Tur-King 7,065—	
11 at \$1.18	8,337.49
300 Ctns. Tur-King 10,716—	
5 at \$1.18	12,645.22
Total	<hr/> \$20,982.71

8-25 Draft on Towle Food Products.

Chicago, Ill. Our invoice T-907	
covering Transfer at Oakland, Cal.	
136 Ctns. Tur-King 4,940—	
1 at \$1.05	5,187.06
Our invoice T-924 covering Trans-	
fer at Los Angeles, Calif.	
698 Ctn. Tur-King 24,580—	
10 at \$1.05	25,809.66
Total	<hr/> \$30,996.72

8-10 Payment by A. Adams in Salt Lake
with no detail as to invoices paid .. \$51,894.47

9-17 Payment received in Chicago from
Ed Hart to balance the Towle Mfg.
Co. account on Norbest books \$43,956.83

Note: On our invoice T-855 100 Ctn. 3601-13 at \$1.18 \$4,250.00
to be delivered to Snow & Co., Independence, Missouri
was refused and above was stored at Kansas Cold Storage
Co., Wichita, Kans. for Towle Food Products Co.

9-28-54

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 16-A

Towle Manufacturing Company Statement of Account

Date Billed	Shipped From	Inv. No.	Pounds	Price	Amount
5-25	Fulton-Chi	T-715	1732-8	.99	1,715.17
5-28	Fulton-Chi	T-724	250-3	.99	247.69
6-9	Fulton-Chi	T-734	143-11	.99	142.25
6-11	Fulton-Chi	T-743	177-8	.99	175.73
6-13	Fulton-Chi	T-753	36-1	.99	35.70
6-18	Fulton-Chi	T-761	317-15	.99	314.76
6-18	Fulton-Chi	T-763	349	.99	345.51
6-21	Fulton-Chi	T-770	537-14	.99	532.50
6-23	Fulton-Chi	T-773	420-7	.99	416.23
6-28	Fulton-Chi	T-777	1572-6	.99	1,556.65
7-6	B-R, Sacto	T-790	177-1	.99	175.29
Total			5714-10		\$ 5,657.48

Less Payments by
Towle Mfg. Co.,
Walnut Creek, Calif.

6-3	R-1249	1,715.17
6-11	R-1285	247.69
6-16	R-1305	317.98
6-23	R-1452	695.97
6-28	R-1369	948.73
7-18	R-1471	1,731.94

Total

5,657.48

Balance

None

7-7	B-R, Sacto	T-791	40,911-12	.99	40,502.63
7-12	Fulton-Chi	T-794	2,738-5	.99	2,710.92
7-12	B-R, Sacto	T-801	3,533-9	.99	3,498.23
7-13	Fulton-Chi	T-805	710-8	.99	703.40
7-14	B-R, Sacto	T-813	30,055-13	.99	29,755.25
7-14	B-R, Sacto	T-814	526-12	.99	521.48
7-21	Fulton-Chi	T-826	2,845-1	.99	2,816.62
7-26	Fulton-Chi	T-833	70-11	.99	69.98
7-31	Fulton-Chi	T-849	889-13	.99	880.91
8-5	B-R, Sacto	T-855	21,383-13	.99	21,169.97
8-6	Fulton-Chi	T-858	2,317-9	.99	2,294.39
8-9	Fulton-Chi	T-862	70-9	.99	69.86
8-20	Fulton-Chi	T-904	142	.99	140.59
8-20	B-R, Sacto	T-905	34,530-5	.99	34,185.01
8-23	Fulton-Chi	T-906	20,845-13	.99	20,637.36
8-23	Natl. Ice-Oakland				
		T-907	4,940-1	.99	4,890.66
8-30	Merch.-S.F.-(Strapping)				
		W-1240			2.70
8-25	L.A. Ice-L.A.				
		T-924	24,570-10	.99	24,324.92
8-25	Merch.-S.F.	T-925	925-5	.99	916.06
8-24	Fulton-Chi	W-1221	(Strapping, etc.)		185.89
9-13	Natl. Ice-Oakland				
		W-1318	(Strapping,)		27.00

Total 192,008-05

\$190,303.83

Grand Total Pounds ..197,722-15

Less Payments by
Towle Food Products
Chicago, Illinois

7-26 (Lipsman-Fulkerson on T-813)	
R-1500	34,564.18
8-10 Check R-1562	51,894.47
8-16 (Lipsman-Fulkerson on T-855)	
J-2549	20,982.71
8-25 Draft R-1636	30,996.72
	<hr/>
Total	\$138,438.08
	<hr/>
Balance	\$ 51,865.75
Less Credit Memo 4c per pound on Tur-	
King purchases — 197,722# 15 oz.	
at .04	7,908.92
Payment 9-17-54, Towle Food Products,	
Chicago	43,956.83
	<hr/>
Balance 9-21-54	0

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 17

Towle Manufacturing Company, Inc.
2710 Mt. Diablo Blvd.
Walnut Creek, California

September 24, 1954.

Mr. Herbert Beyers, General Manager,
Norbest Turkey Growers Association,
P.O. Box 1529,
Salt Lake City, Utah.

Dear Mr. Beyers:

This will acknowledge receipt of your schedule

of frozen turkey shipments per your orders from George J. Towle, President of Towle Manufacturing Co. Shortly before he left on his trip last month, George and I went over the orders, etc., and he asked me in his absence to check over your schedule of shipments when received.

Can you tell me which invoices are covered by the following payments on your schedule:

34,564.18

51,894.47

20,982.71

30,996.72

43,956.83

George also informed me that in the event 190,000 pounds or more were shipped by you, Towle Manufacturing Co. would receive an additional credit of 4 cents a pound, making the cost to us of 95 cents a pound. In view of this, I presume that a check will be forthcoming from you for \$7,908.92 per your calculation on page 2 of your schedule.

May I hear from you at your convenience?

Yours very truly,

CLARENCE E. BETZ,

Secretary, Towle Manufacturing Co., Inc.

CEB:mc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 18

[Letterhead]

Norbest Turkey Growers Association
P.O. Box 1529—Salt Lake City 11, Utah

August 16, 1954.

Kansas Cold Storage Co.,
Wichita, Kansas.

Gentlemen:

Please store in the name of Towle Food Products Company, 540 Lakeshore Drive, Chicago, Illinois, the 100 cartons of boneless turkey stored in your warehouse by Lipsman-Fulkerson Company.

Please bill Towle Food Products Company for the storage charges from the original storage date.

Yours very truly,

/s/ H. B.,

HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

PFL:jf

cc/Towle Food Prod. Co., Chicago, Ill.

cc/Towle Mfg. Co., Walnut Creek, Cal.

(Copy)

Norbest Turkey Growers Association
Salt Lake City, Utah

As Agent for Towle Mfg. Co., Walnut Creek, Calif.

Invoice Statement.

Date: Aug. 16, 1954.

To: Towles Food Products Co., 540 Lakeshore Drive, Chicago,
Illinois.

Shipment from Sacramento 8-3-54: 21,383-13 1.05 \$22,453.00

Less Payment received from Lipsman-Fulkerson for:

200 Ctns. 7,065-11 @ 1.18

300 Ctns. 10,716-5 @ 1.18

17,782# 20,982.71

Balance Due\$ 1,470.29

The balance of this load consisting of 100 Ctns. 3,601-13 was stored in Kansas Cold Storage Co., Wichita, Kan., for your account as the shipment was refused by consignee account of not agreeing to price.

[Endorsed]: Filed June 4, 1958.

DEFENDANT'S EXHIBIT A

Leaving N. Y. Sunday, 6:00 p.m. If you need me before.

[Letterhead]

The Waldorf-Astoria
Park and Lexington Avenues
49th and 50th Streets
New York 22

Aug. 12.

Dear Clarence.

Had a satisfactory visit with Norbest-Adams of Towle Food Prod. in Chicago on Monday.

Tuesday, Adams was to give Norbest a check for all our unpaid invoices to Norbest at 1.05 per lb.

Enclosed is our statement of what we owe Norbest at .99 up to and including the invoice T. 858 which I gave you and T. 862 which I do not believe I had received.

Towle Food Prod. still owe us for the four invoices I have boxed on the enclosed which Norbest is not billing them for as we have paid them. Adams said he would include them in his check to Norbest. Please check this when you get the receipt and statement from Norbest. If not paid, send them a statement.

T. F. P., Inc., have also agreed to be invoiced, and pay for some 80,000 lbs. and pay up by Aug. 20. We should receive our check from Norbest shortly after Fred George will be in touch with you and can explain anything regarding our understanding.

Had good trip. We took it easy, making three overnight stops.

Thanks for looking after things.

Regards,

/s/ GEO.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for the appellants:

Excerpt from Docket Entries.

Complaint.

Answer.

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Memorandum of Costs with Notice of Taxing.

Objections of Plaintiff to Memorandum of Costs.

Motion to Review Taxation of Costs.

Order on Motion to Review Taxation of Costs.

Notice of Appeal.

Appeal Bond.

Order Extending Time to Docket Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Appellants' Designation of Record on Appeal.

Reporter's Transcript of Trial Proceedings.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 16, 17, 18, 19.

Defendant's Exhibit A.

In Witness Whereof I have hereunto set my hand
and affixed the seal of said District Court this 9th
day of January, 1959.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 16317. United States Court of
Appeals for the Ninth Circuit. George J. Towle
and Fred George, Individually and as Co-partners
Doing Business as Towle-George Turkey Log Com-
pany, Also Known as Towle Food Products Co., a
Partnership, Appellant, vs. Norbest Turkey Grow-
ers Association, a Corporation, Appellee. Tran-
script of Record. Appeal from the United States
District Court for the Northern District of Cali-
fornia, Southern Division.

Filed and Docketed: January 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,317

GEORGE J. TOWLE and FRED GEORGE. Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY. Also Known as TOWLE FOOD PRODUCTS CO., a Partnership.

Plaintiffs-Appellants.

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a Corporation.

Defendant-Appellee.

APPELLANTS' STATEMENT OF POINTS

Appellants, George J. Towle and Fred George, individually and as co-partners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, in accordance with Rule 17.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, state that the points upon which they intend to rely on their appeal from the Final Judgment entered by the District Court on September 15, 1958, are as follows:

1. The District Court erred in ordering and adjudging that plaintiffs, George J. Towle and Fred George, individually and as co-partners doing

business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, shall take nothing by reason of their complaint.

2. The District Court erred in ordering and adjudging that judgment is hereby awarded to defendant Norbest Turkey Growers Association against plaintiffs.

3. The District Court erred in ordering and adjudging that defendant shall have and recover its costs as against plaintiffs, and each of them, herein.

4. The District Court erred in concluding that defendant agreed to act as the gratuitous agent for plaintiffs for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois (Conclusion of law, III).

5. The District Court erred in concluding that defendant did not violate any of the terms of any understanding or agreement with plaintiffs either oral or written with regard to this agency and had full authority, express or implied, to act as it did with regard to this agency (Conclusion of law, IV).

6. The District Court erred in concluding that no credits ever accrued in favor of plaintiffs, or any of them, out of any moneys held or received by defendant in excess of the amounts owing by plaintiffs to defendant (Conclusion of law, V).

7. The District Court erred in concluding that there never was and there is not now owing any sum of money from defendant to plaintiffs in connection with any of the transactions which were the subject of this action (Conclusion of law, V).

8. The District Court erred in concluding that defendant Norbest Turkey Growers Association is entitled to have and to recover judgment in its favor and to recover its costs herein as against plaintiffs (Conclusion of law, VI).

9. The District Court erred in implying in Finding V that the only instances in which defendant made shipments were "those instances where the Illinois corporation specifically requested that shipment be made sight draft bill of lading" or "where the Illinois corporation had specifically requested sight draft shipment."

10. The District Court erred in finding that defendant "in all instances followed plaintiffs' instructions with regard to shipments and billing" (Finding V).

11. The District Court erred in finding that "it is not true that on or about this date any arrangement was changed as between plaintiffs or any of them and defendant" as found in Finding VI.

12. The District Court erred in finding that "it is not true that prior to August 6, 1954, or at any time plaintiffs or any of them gave instructions to defendant that shipment of turkey logs to the Illi-

nois corporation should be made only on a sight draft payable to Norbest or that on August 6, 1954, or at any time, defendant acknowledged any such instructions," all as is found in Finding VII.

13. The District Court erred in finding that "it is not true that at this or at any other time defendant agreed or reaffirmed that all shipments were to be on a sight draft bill of lading basis only," all is as found in Finding VIII.

14. The District Court erred in finding that the transfers referred to in Finding IX were "in accordance with its agreement with and instructions from the partnership and plaintiffs and not in violation of any of them."

15. The District Court erred in making Finding X.

16. The District Court erred in finding that "no credit at any time ever accrued to the plaintiffs for which a proper allowance has not been made" as found in Finding XI.

17. The District Court erred in imposing upon plaintiffs the burden of proof on the issue of whether credit could or could not be extended by the agent.

18. The District Court erred in sustaining objections to the following questions propounded to Fred George, on the ground that they were directed to hearsay so far as any instructions given by Mr.

Towle to Mr. George. Answers thereto were given and received under Rule 43 as follows:

“Q. Mr. George, before this meeting on June 10, had Mr. Towle given you any instructions with regard to the payment of future deliveries of the turkey logs? A. You mean on August 10?

“Q. August 10th. Pardon me.

“A. He had not given me any specific instructions. None, I think, until the evening of the 9th. The evening of the 9th of August, he did.

“Q. What were the instructions you were given on the evening of the 9th?

“A. They were given me by Mr. Towle after he had determined that he would not be present, definitely determined that he would not be present for the meeting of the morning of the 10th.

“Q. Would you go on, Mr. George?

“A. Mr. Towle called me in my room and said that he had received the weather report and that he and Mrs. Towle would be taking off early the next morning, that he would not be in the meeting with Mr. Beyers; and, as I recall, he asked me to come down to his room, and his instructions to me were that after the check was received which Mr. Adams had indicated to both Mr. Beyers and Mr. Towle, as I understand it, was in the mail, after that check was received that I was to make sure that there was an understanding that the balance of the inventory would be handled on an SDBL basis.”

19. The District Court erred in sustaining objection to the following questions propounded to George J. Towle, the answers being received under Rule 43:

“Q. Would you please state the facts and circumstances of the instructions which you gave to Mr. George?

“A. I had given Mr. George instructions, I guess you would say, or authority to speak to Mr. Adams. The next morning, that is the morning of the 10th, we had planned on leaving early. I didn't know whether—I didn't expect to see Mr. Adams the next morning, because we were leaving immediately for the East, and I told Mr. George that when the check came in from Chicago that he should at that time inform Mr. Adams that future shipments would be on sight draft.

“Mr. Hoppe: Were you present at any time that such information concerning the sight draft was communicated to Mr. Adams?

“Mr. Ruff: By Mr. George?

“The Witness: By Mr. George?

“Mr. Hoppe: By anyone.

“A. By someone, yes.

“Q. When was that?

“A. That was the next morning at breakfast.

“Q. And who communicated this information to Mr. Adams? A. I did.

“Q. What did you tell Mr. Adams?

“A. After he showed me the check, I told him that we were very glad to have it, and that from

now on, in the future, it would be paid—it must be paid for on sight draft.”

20. The District Court erred in failing to enter findings of fact substantially as pleaded in the complaint on file herein.

21. The District Court erred in failing to enter judgment in favor of plaintiffs against defendant herein.

/s/ CARL HOPPE,

One of the Attorneys for
Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 17, 1959.

